This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

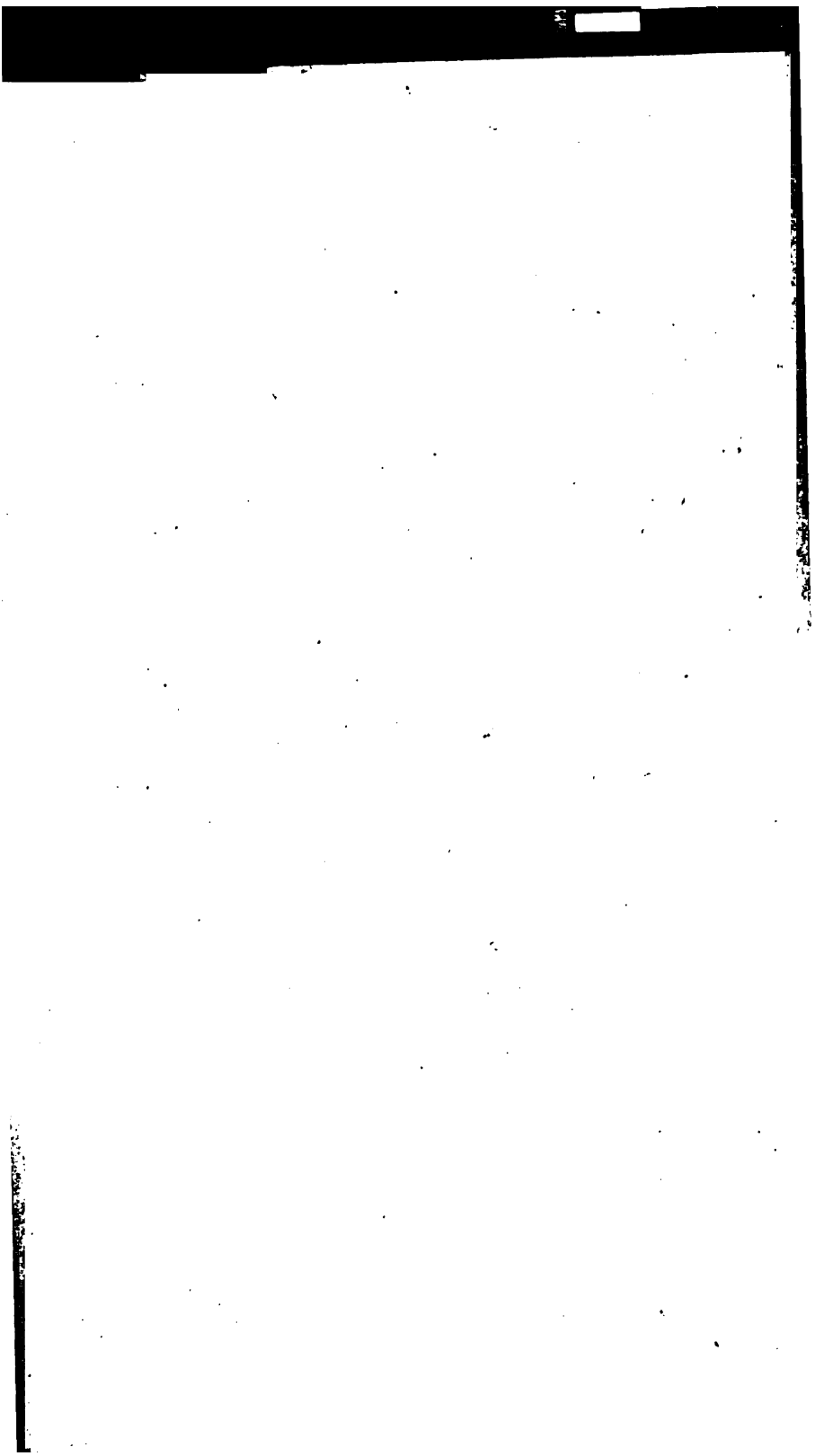
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

L RESEARCH LIBRARIES
33 07596023 1

1888/89



DECISIONS

OF

THE DEPARTMENT OF THE INTERIOR

IN

CASES RELATING TO PENSION CLAIMS,

THE OPINION OF ATTORNEY-GENERAL CUSHING ON "LINE OF DUTY,"

AND THE

LAWS OF THE UNITED STATES GRANTING AND GOVERNING PENSIONS AND BOUNTY-LAND GRANTS.

1888/89

VOLUME II.

Edited by GEORGE BABER,
BOARD OF PENSION APPEALS.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1889.

13609—VOL 2—I

32326

ASTOR LIBRARY
APR
23
1895
NEW YORK

NEW YORK
PUBLIC
LIBRARY

PREFACE

In pursuance of an act of Congress providing for the publication, and following the directions of the Secretary of the Interior, the decisions relating to pensions which compose this, the second volume, are selected, as were those in the first volume, from the cases submitted to the Board of Pension Appeals, with a view to still further "establishing a line of consistent precedents in departmental rulings" on the several classifications of pension claims; and the volume is presented in the belief that it will prove substantially valuable to claimants, to attorneys, and to the Department itself as a guide in the construction and application of the various statutory provisions relating to such claims. The volume contains also, as *addenda* to the decisions, the opinion of the late Attorney-General, Caleb Cushing, on "the relation of line of duty to pension claims" [reproduced from page 149, Vol. VII, "Opinions of Attorneys-General"], and also the bounty land laws now in force.

TABLE OF CASES.

A.

Page.

Adams, Peter (special act of Congress) 46
Adams, John 63
Aldrich, James H 338
Allen, Rebecca (widow of John E. Allen) 262

B.

Barnard, Francis N 244
Barnes, George W 301
Beckert, Charles A 224
Beeler, George M 116
Becher, Joseph 109
Beede, Minerva (widow of Washington C. Beede) 119
Bennett, Thomas S 9
Blair, John 183
Bonton, Edwin H 23
Bone, Wallace G 310
Booth, Thomas B 299
Brockman George H. (on motion for reconsideration) 239
Brooks, William J 269
Brown, Arad P 88

C.

Carpenter, Henry W 230
Case, Stephen G 345
Castalor, Phebe (widow of Clark J.) 32
Cassin, John H. (reconsideration) 376
Cassidy, Michael 379
Cawood, Everett 19
Chapin, Albert T 254
Children of Peter Williams 383
Collins, Jacob (guardian) 381
Colnor, Edward A 21
Connor, Levi 1
Coburn, Mary (widow of Thomas Coburn) 80
Compton, Mary A. (widow of Stephen Compton) 129
Costello, John 84
Cowie, Florence N. (widow of Albert T.) 58
Cratzer, Peter J 104
Curtis, Fanny (widow of Frank H., colored) 159
Cushman, Sarah (mother of James E., deceased) 186
Cutts, Adam 28

D.

	Page.
Daly, Thomas	220
Darvean, Louis	372
Deaver, W. H. (attorney)	194
Dissman, John F. (late teamster)	19
Dunlap, Oscar	194

E.

Eckerson, Theodore J	187
Eckerson, Theodore J. (motion for review)	309
Edwards, James (colored)	136
Everly, Jeremiah	241

F.

Fairfield, Cyrus	65
Fairman, Charles E. (attorney)	355
Farrar, Mary (widow of Stedman B.)	199
Fike, Cyrus	65
French, Benjamin J. W	356

G.

Gallagher, Ann (widow of Phillip Daniel)	332
Gillespie, Alexander	16
Gillett, Cypert P. (reconsideration denied)	74
Gleason, John H	106

H.

Halstead, Henry	221
Hamilton, Zenas	217
Harding, James	232
Helman, Henry	344
Helmer, Henry A	385
Hennick, Delila (widow of Henry)	94
Hetfield, Ezra D	155
Hirsch, Robert	304
Hunter, Joseph H. (attorney)	189
Hyer, Aaron	237

J.

Johns, William B	393

K.

Kennerly, Florida (widow of Pierre M.)	265
King, Charles and William B	130
Knappenberger, Caroline (mother of Charles)	56

L.

Lake, Ann Eliza (widow of Louis S.)	111
Langhorne, Maurice (attorney)	211
Legal disabilities of pensioners (by Secretary Vilas)	94
Lewis, Mary E. (widow of George W.)	334
Livezey, Mary E. (widow)	260
Lockridge, Daniel S	358
Longshaw, Margaret (mother of William Longshaw)	387

M.

	Page.
Mayer, Margaret (widow of Adam)	203
Milbourne, Chalkley T. C	360
Miller, Leonhart	142
Miller, Ruth L. (widow of Francis O.)	214
Milliner, Richard	112
Minors of Hamilton S. Wilson	364
McIntosh, Lachlan L	366
McLaughlin, John H	85
McMurphy, William O	246
Morrison, Ellen (widow of Daniel Milliken)	100
Morrison, Ellen (widow of Daniel Milliken; *reconsideration*)	272
Morris, John W	73
Mueller, Fritz	214
Mullin, Chambers C	18
Muse, Robert W. P	180

N.

Neher, Margareta (mother of Charles)	347
Newton, George S	144

O.

O'Hare, Patrick	370
Owen, James R	390

P.

Pennebaker, C. D., jr. (attorney)	257
Pettit, Ellen (widow of Jerry)	205
Pfau, Paul	373
Posson, Edward	36
Probasco, Jacob S	285

Q.

Quin, Annie (widow of John)	248

R.

Randolph, Burton	335
Redding, Daniel M	167
Rees, David	307
Reeves, Levi	177
Ridenour, Newton C	348
Roberts, Ellen (guardian of Williams; insane)	350
Rousseau, Lawrence H	6
Rousseau, Lawrence H. (motion for reconsideration)	151
Rummell, David G	91

S.

Saunders, George W	11
Sawyer, Joseph D	122
Sawyers, David A	70
Scanlin, James	148
Scott, William H	43

Page.
Schulde, Jacob 338
Sell, Isaac 172
Shroeders, Edgar 353
Shults, minors of John S 298
Sinton, Richard H 320
Smith, Henry 358
Solomon, George 29
Spilman, Mary F. (widow of George F.) 133
Sprong, Emma E. (widow of Daniel L.) 107
Stack, Sarah A. (mother of John G.) 153
Stabler, Alban G. (for Edward Campbell, alias Henry Mulholland) 75
Stabler, Alban G. (for Edward Campbell, alias Henry Mulholland; *reconsideration*) 176
Stevens & Co., Milo B. (attorneys) 226
Stevens & Co., Milo B. (attorneys) 162
Stevens & Co., Milo B. (attorneys) 163
Stevens & Co., Milo B. (attorneys) 164
Stevens & Co., Milo B. (attorneys) 208
Stevens & Co., Milo B. (motion for reconsideration) 236
Stevens & Co., Milo B. (attorneys) 195
Stevens & Co., Milo B. (attorneys) 190
Stevens & Co., Milo B. (attorneys) 132
Stevens & Co., Milo B. (attorneys) 235
Stevens, Milo B., & Co 398
Stevens, Milo B., & Co 399
Stilwell, Jesse M 83
Struble, Charles W 14
Swartz, John 3
Switz, Anna P. (mother of Abram) 342

W.

Wallace, Clarence 41
Waters, Annie M. (widow of Henry M.) 227
Waterbury, William 53
Warren, Cornelius 278
Weddle, John R 97
Welch, Patrick, alias Patrick Connally 228
Wilkerson, Julia M. B. and Susanna 250
White, Simeon 210
Woerheide, Fredericka (widow of Henry) 146
Worthley, Albert 212
Wright, Laura (widow of John L.) 253

Y.

Yarnell, Ziba 25

Z.

Zimmer, John 341

ADDENDA.

RELATION OF LINE OF DUTY TO PENSION CLAIMS:
Opinion of Attorney-General Caleb Cushing 401
BOUNTY LAND LAWS:
Statutes now in force 417

DECISIONS RELATING TO PENSIONS.

SUFFICIENCY OF HOSPITAL RECORD.

LEVI CONNOR.

The hospital record, made during service, is presumed to be correct, as showing all the diseases or disabilities and likewise all the treatment which claimant had during the service; and where claimant, years after his discharge, alleges a disease or a disability of which his hospital record contains no mention, and of which also there was no evidence apparent at discharge, the presumption is that said disease or disability was not incurred in the service, but subsequently to his discharge, and it is not, therefore, pensionable.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 5, 1888.

The papers accompanying the appeal of Levi Connor, late of Company D, One Hundred and Fifty-second Pennsylvania Volunteers, from the decision of your office rejecting his claim (No. 247053) for invalid pension, are herewith returned to you.

Claimant enlisted March 23, 1864, was mustered into the service as a recruit March 24, 1664, and was mustered out with his company November 9, 1865.

Claimant filed his declaration January 3, 1878, alleging that in April, 1864, in front of Richmond, Va., he was severely strained and ruptured by his horse jumping a ditch, causing injury to spine and rupture in right groin.

In an affidavit filed August 12, 1879, claimant states that the accident resulting in the alleged injury and hernia occurred in February, 1865, while he was on his way to do duty with battery A, First Pennsylvania Light Artillery.

The records of the Adjutant-General's office show no evidence of the alleged fact that claimant was disabled either by injury or by hernia in April, 1864; but claimant, in his affidavit filed August 12, 1879, amends his declaration by stating that the accident resulting in the injury and hernia occurred in February, 1865.

The Surgeon-General's records show that claimant was admitted to Point of Rocks Hospital, Virginia, March 31, 1865, with rheumatism, and returned to duty April 16, 1865.

The claim was rejected December 12, 1882, on the ground that—

Rupture existed *prior* to enlistment; spine was not injured in the service as alleged; and rheumatism and disease of kidneys have not been alleged.

From this adverse decision the present appeal is taken.

Since the rejection of the claim by your office, claimant has filed affidavits, made by Richard Brown, J. E. Halleck, Jacob Kocker, Manville Jenkins, Alfred Cunon, and by others, tending to show claimant's soundness *prior* to his enlistment in the service, but after considering the aforesaid affidavits you adhere to your action rejecting the claim.

OPINION.

The papers accompanying this appeal contain much conflicting evidence, having reference to the origin and nature of the disabilities which claimant alleges in his declaration for pension. After examining this evidence I have reached a different conclusion from yours as to the *origin* of said disabilities, although I concur in your action rejecting the claim for pension. Apart from the conflicting statements of witnesses as to the time and the place of incurrence and as to the causes of the disability resulting from the alleged incurrence of hernia and injury to back in the service, and also the negative character of the testimony, it is noticed that, at about the time (February, 1865) when, as claimant states, he incurred the said injury and hernia, he was admitted to Point of Rocks Hospital, Virginia (March 31, 1865), but that the disability on account of which he was so admitted was *rheumatism*, from which he had recovered sufficiently to be returned to duty, April 16, 1865—a little more than two weeks from the date of his entrance into the hospital. The hospital record thus made by claimant is the only one that appears in the accompanying papers.

It appears, furthermore, that from the time when claimant left the hospital and returned to duty he was continuously in the service until November 9, 1865, when he was mustered out with his company.

From the foregoing facts I draw the following conclusions:

(1) Claimant, whether a perfectly sound man or not at the date of his enlistment, March 24, 1864, was admitted to the hospital at Point of Rocks, Va., with "rheumatism," and not by reason either of hernia or of injury to spine or back; and the fact that he remained in the hospital for treatment only sixteen days is good ground for the inference that the "rheumatism" was comparatively slight.

(2) If claimant had incurred, as he alleges, the disease of hernia and the injury of spine at the time and in the manner set forth in his declaration, such disabilities would have been made matters of hospital record, requiring, as it is reasonable to believe, careful medical treatment; but the brevity of claimant's stay in the hospital may be fairly accepted as strong evidence, if not proof, that he was not so seriously afflicted.

(3) It is, furthermore, a reasonable conclusion that the record made in the hospital at Point of Rocks, Va., was not only correct, but em-

braced all the disabilities which claimant had at the time. In the case of Ellis Luther (vol. 1., P. D., p. 387) the Department said:

The force and effect which should be given to such a hospital record as is presented here has been frequently decided by the Department to be that the record made of treatment in hospital during service is presumed to be correct, and as showing all the diseases and all the treatment which claimant had during his Army service; and it is further to be presumed that he was not treated for any disease other than that stated; and these presumptions will obtain until the contrary is clearly and satisfactorily established by competent evidence.

In support of the ruling thus quoted, I call your attention to the cases of Riordan, Bridget (vol. 1, P. D., p. 45); Woods, Thomas (*id.*, p. 247); and Handy, William H. (*id.*, p. 259). Claimant's hospital record mentions "rheumatism" only, as the disease with which he was afflicted, and for which he was treated in the service.

(4) There is no record nor other satisfactory evidence in the accompanying papers going to show that claimant's alleged disabilities existed at the date of his discharge from the service, and the presumption is that they did not, in fact, exist at that time. Nor is there any satisfactory evidence of the existence of either the alleged hernia or injury of spine until 1867—two years subsequent to claimant's discharge from the service; but the service can not be fairly held responsible for them at that late date, in the absence of absolute proof to the contrary. It is also reasonable to conclude that, as there is no proof showing that claimant's alleged disabilities were due to the service and line of duty, they were incurred subsequent to his discharge from the service, and, therefore, are not legally pensionable. Claimant makes no claim for pension by reason of rheumatism, of which there is a hospital record in the service; and, therefore, that disability can not be considered in the adjudication of this appeal.

In view of the foregoing reasons, I concur in the rejection of this claim and dismiss the appeal.

RECONSIDERATION—RES ADJUDICATA.

JOHN SWARTZ.

The Department will not review nor reconsider questions in appeals for rehearing unless it be definitely shown by competent evidence that some error has been committed, or that the new evidence and new facts would materially change the former conclusion. In the absence of such new and material evidence, the merits of the claim, as passed upon, are *res adjudicata*.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 5, 1888.

Herewith are returned the papers which accompanied your report of November 15, 1887, in the claim for invalid pension, No. 98821, of John Swartz, late private, Company C, One hundred and seventy-eighth Ohio Volunteers.

Claimant enlisted September 15, 1864, and was discharged June 29, 1865. He filed his declaration for pension December 28, 1865, alleging disability from inflammatory rheumatism, contracted in the service in 1864 from exposure. In a supplementary affidavit, filed July 7, 1866, he alleges that, about November 15, 1864, at Nashville, Tenn., he was attacked with rheumatism, caused by exposure, and ever since he has been afflicted with it; that in the march of the Twenty-third Army Corps north to co-operate with Grant and Sherman at a point on the Ohio River, near Louisville, Ky., in an attempt to go on shore from a steam-boat by order of his officers, he incurred hernia, about December 24, 1864.

The records of the War Department, as contained in the reports of the Adjutant-General show that the soldier enlisted September 15, 1864, for one year, and was reported on rolls from muster in to October 31, 1864, present; November and December, 1864, he absented himself from company (without leave) on the march from Murfreesborough, Tenn., to Columbia, Tenn., December 24, 1864; January and February, 1865, absent without leave; March and April, 1865, presence or absence not stated, with the remark, "Returned from desertion, April 25, 1865." Returns for March, 1865, report him absent without leave. Not reported absent on returns for May, 1865. He was mustered out with company, June 29, 1865. Regimental hospital records not on file, except surgeon's morning report, which furnishes no information. Company morning reports from October, 1864, to June, 1865, show him, May 3, 1865, absent, sick, New Berne, N. C.; June 16, 1865, sent to hospital, Charlotte, N. C., company returns not on file. Nature of sickness, May, 1865, not stated. Cause of absence in hospital, June, 1865, not stated. The Surgeon-General reports soldier admitted to hospital, Wheeling, W. Va., February, 1865, from regiment for treatment for jaundice and hernia, and returned to duty, April 3, 1865.

Since filing his original declaration, claimant has had three medical examinations: (1) By single surgeon at Lancaster, Ohio, September 20, 1865, who rates him three-fourths for chronic rheumatism; (2) by single surgeon at Lancaster, Ohio, May 7, 1868, who rates two-thirds for chronic rheumatism and right inguinal hernia; (3) by board of surgeons at Lancaster, Ohio, April 7, 1875, who find no disability from rheumatism, and rate total for inguinal hernia, right side.

The claim was originally rejected by your office, March 22, 1880, on the ground that the hernia alleged was not incurred in line of duty, and rheumatism on the ground of no proof of either incurrence in the service or that soldier had been disabled thereby since discharge. This action of rejection was affirmed on appeal by the Department, July 30, 1880. Subsequently, the claim appears to have been reopened informally by your office and held in abeyance. Some testimony was filed, and some correspondence appears to have been had with claimant and his attorneys. On October 25, 1886, the record evidence in the claim was re-

turned to the Adjutant-General, U. S. Army, with a view to remove the charge of desertion. In a report dated November 5, 1887, he states that the charge of desertion on the roll for March and April, 1865, is removed. He was absent without leave from December 24, 1864, to January 9, 1865, and from January 17, 1865, to February 18, 1865.

It would appear from indorsements upon the jacket that the testimony filed subsequent to the rejection of the claim was considered insufficient to overcome the grounds of rejection, and that your office adhered to its former action. From this action an appeal was filed by claimant's attorneys July 19, 1888. It also appears, incidentally, that, pending the adjudication of this claim, the claimant died some time in the year 1886, and his widow filed claim for pension May 26, 1886, said claim being now pending, awaiting action upon the original claim.

OPINION.

It appears that this claim was originally rejected, March 22, 1880; and, on appeal to the Secretary of the Interior, said rejection was affirmed by Departmental decision, July 30, 1880. It would seem that the claim had been then informally reopened without definite action on your part; but the claimant was permitted to file several affidavits, tending to show that the claim had been improperly rejected. Correspondence seems to have been had with the claimant and his attorneys from time to time, for several years; and it is to be inferred, from information contained in the papers, that your former action, and that of the Department, was adhered to and the claimant so informed—from which action the appeal was taken.

The evidence filed since the first rejection of the claim is wholly insufficient to change in any respect the former action of your office, merely tending, as said evidence does, to cast discredit upon one of the witnesses whose testimony was filed prior to the former action upon the claim. The invariable practice of the Department, as held in numerous decisions, has been to refuse to review or to reconsider questions in claims of this character, or to re open an adjudication thereof, unless it be definitely shown by competent evidence that some error was committed, or that new evidence and new facts would materially change the former conclusion. No such evidence has been filed in this claim, nor has it ever been contended that any new or material facts existed which were not considered and fully weighed in the previous adjudication of the claim. The merits of the claim have been passed upon and are *res adjudicata*, and the former action of the Department, including that of your office, will not be disturbed. (See cases of Tyner, Noah N., Vol. I, P. D., p. 21; Hoyt, Birney, *id.*, p. 70; Jones, Roland M., *id.*, p. 162; Gordon, Morgan, *id.*, p. 188.) Your action of rejection of the claim is accordingly affirmed and this appeal dismissed.

ORIGIN OF DISABILITY—VETERAN FURLOUGH.

LAWRENCE H. ROUSSEAU.

1. A disease or other disability is not considered as in line of duty if incurred by a soldier on veteran furlough, unless the soldier was under orders and with the organization to which he belonged.
2. A disability resulting from impure vaccination incurred voluntarily by claimant, whilst absent from his command on veteran furlough, and under treatment of a lay surgeon, held to be not due to the service and, therefore, not pensionable.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 13, 1888.

Herewith are returned the papers which accompanied your report of December 21, 1887, upon the appeal of Lawrence H. Rousseau, late lieutenant-colonel Twelfth Kentucky Volunteers, from your action rejecting his claim for invalid pension.

Claimant was mustered into the service as captain January 30, 1862, as lieutenant-colonel September 20, 186[illegible], and discharged July 11, 1865. He filed his original declaration for pension March 25, 1880, alleging as the basis of his claim, among other disabilities, that "about the 1st of February, 1864, he was vaccinated for small-pox with impure virus—said by the physicians to be scrofulous and spyhilitic—the effects of which still trouble him."

The records of the War Department, bearing on the claim for above-mentioned disability, show that the claimant was granted leave of absence as per the following order:

[Special Orders, No. 32.]

HEADQUARTERS A. A. P. M. G., OF KENTUCKY,
Louisville, Ky., March 1.

Leave of absence is hereby granted the following-named officers of the Twelfth Kentucky Infantry, by reason of the re-enlistment of the regiment as veteran volunteers, until the 29th day of March, 1864, at the expiration of which time they will report at Point Burnside, Ky., the place of rendezvous of said regiment:

Lieut. Col. L. H. Rousseau.

By order of Major W. H. Sidell,
Fifteenth U. S. I., A. A. P. M. G. of Kentucky.

Since filing his original declaration, the claimant has been subjected to the following medical examinations:

January 14, 1882, by single surgeon at Edmunton, Ky., who rates him ½ for nasal catarrh, and nothing for disability in question.

May 12, 1886, by Board of Surgeons, Columbia, Ky., who rate him ½ for the disability in question, and ½ for other disabilities alleged.

July 14, 1886, by same Board, same rating.

November 23, 1887, by Board of Surgeons at Burksville, Ky., who rate ½ for catarrh and results, and ½ for disability in question.

The claim was specially examined, and, on February 18, 1887, it was rejected so far as it related to the alleged disability of syphilis, the result of impure vaccine virus, upon the ground that it was not incurred in line of duty.

The alleged disability of nasal catarrh was admitted, and claimant pensioned therefor at the rate of $15 per month.

On November 21, 1887, claimant filed an appeal from your action rejecting his claim for disability resulting from vaccination from impure virus, contending that, at the time said disability was incurred, he was in line of duty acting under orders recruiting his regiment.

It further appears that, on April 30, 1887, claimant filed a declaration for increase of pension granted as above, which claim is still pending.

OPINION.

It seems that the appellant in his original declaration for pension alleged a number of disabilities as incurred during his military service, and upon which he based his claim for pension. After a thorough and exhaustive special examination of the claim, one of the said alleged disabilities was admitted by you and appellant pensioned therefor at the rate of $15 per month, or one-half total. The remaining disabilities alleged in said declaration were rejected by you upon various grounds, and among them the alleged disability resulting from vaccination with impure virus, said to be scrofulous and syphilitic, on the ground that it was shown by the evidence not to have been incurred in the line of duty. From your action rejecting his claim for this disability on said ground, the appellant files the present appeal, abandoning the other alleged disabilities.

The subject of inquiry here presented is thus limited to a consideration of your action taken with regard to the disability resulting from vaccination.

It appears from the records of the War Department that, in the month of March, 1864, the regiment in which appellant was lieutenant-colonel re-enlisted as veteran volunteers, and were granted a veteran furlough of thirty days, and, by a special order, dated March 1, 1864, the appellant was granted a leave of absence the same length of time for that reason. He states in his testimony before the special examiner that it was during the time he was at home on said leave of absence that he was vaccinated as alleged, and incurred the disabilities for which he claims pension, but insists that he should be considered in line of duty during said time, for the reason that he employed himself in looking after the men of his regiment on furlough and recruiting new men, and was so employed in the line of his military duty in the interest of the service at the very time of the incurrence of the disability alleged. He states, however, that he was performing this duty upon the mere verbal order or request of some superior officer, he can not say who; and he further admits *that he* was influenced in his conduct by the desire to

recruit his regiment up to a number sufficient to entitle him to be mustered with the rank of colonel.

It is manifest that appellant could in no proper and legal sense be considered as acting during this time in line of duty and under orders, inasmuch as he was on leave of absence from his command and acting upon the mere verbal request or order of some unknown superior, and when, as admitted by himself, his line of conduct was partially induced by a private motive affecting his attainment of a higher rank in the service. The fact that he was employed during this time in obtaining recruits for his regiment, while highly proper in itself, can not be held to have been in the line of his duty as a soldier, as he was not acting under any recognized military authority in so doing, nor in pursuance of orders requiring him to so employ his time, nor could he have been, since it is undisputed that he was at home on leave of absence from his command (the regiment being then on veteran furlough) at the time.

Section 4700, Revised Statutes, United States, provides for the only instances in which a soldier shall be entitled to a pension for disabilities incurred while absent from his command on furlough or leave, and is as follows:

Officers absent on sick leave and enlisted men absent on sick furlough, or on veteran furlough with the organization to which they belong, shall be regarded in the administration of the pension laws in the same manner as if they were in the field or hospital.

The Department in construing the above section has long since held that "a soldier on veteran furlough is not considered in line of duty unless he was with his organization," and this ruling has been uniformly adhered to in a long line of decisions. (See Digest, 1885, page 275, and cases therein cited.)

It is clear, then, in view of the facts in this case and the ruling of the Department just cited, that the appellant was not in line of duty at the time of the incurrence of the alleged disability, so as to entitle him to a pension therefor.

There appears as matter of evidence in this case another fact that would prove fatal to appellant's claim, even if the ground already taken were not sufficient. It seems that appellant while at his home, on leave as aforesaid, applied for vaccination to Dr. Moore, at that time a student of medicine. Even if appellant had been at the time in line of duty, acting under orders, he certainly could not claim title to pension upon any theory of law or of reason, if the effect of such an operation should result in producing the disability alleged, unless he could also show that he was compelled to resort to one who was not at that time a qualified practicing physician, by reason of not being able to obtain the services of such a person.

The evidence, however, shows that he was, at the time, in the town of Creelsborough, Ky., and the presumption is, in the absence of anything

to the contrary, that there was a qualified physician in that community, inasmuch as there appears to have been a student of medicine there. If claimant had been in the field or in the hospital, he unquestionably would have been required to apply to the surgeon provided by the Government; and, if the necessity for vaccination existed under circumstances wherein he could not obtain the services of an Army surgeon, common prudence and ordinary care should have prevented his submitting to such an operation at the hands of a mere student not yet qualified to practice medicine nor recognized as a physician. If disastrous results followed such conduct they most assuredly could not be attributed to any other cause than gross carelessness on the part of appellant, nor be held as having been incurred in line of duty.

For the above reasons your action rejecting appellant's claim for pension for the disability under consideration is affirmed, the appeal dismissed, and the papers as requested are returned to you for action upon appellant's pending claim for increase.

CONTRIBUTORY NEGLIGENCE.

THOMAS S. BENNETT.

Where total deafness exists, the claimant, knowing his condition, is required to exercise that care and caution which ordinary prudence would dictate in order to avoid harm or peril, and a failure to do so is equivalent to such contributory negligence as renders the injury thereby incurred non-pensionable, the said injury not being exclusively due to the total deafness that had been contracted by reason of the service.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 20, 1888.

Herewith are returned the papers which accompanied your report of January 7, 1888, upon the appeal of Thomas S. Bennett, late private, Company G, Fifty-sixth Ohio Volunteers, from the action of your office rejecting his claim for increase of pension.

Claimant enlisted August 29, 1861, and was discharged from the service November 22, 1865. He filed his original declaration for pension July 5, 1876, alleging therein as the basis of his claim for pension deafness of both ears, incurred in the service from exposure and heavy cannonading at the siege of Vicksburg in 1863. He was pensioned for said disability at $4 per month from November 23, 1865, and at $13 per month from September 20, 1882, which sum he is now receiving, it being the highest rate allowed by law for total deafness in both ears.

Claimant has been subjected to three medical examinations, two by single surgeons and one by a board of surgeons at Rolla, Mo., all of said examinations showing the disability of deafness as existing at the rate at which he has been pensioned.

He filed declaration for increase July 22, 1885, alleging "total deafness in both ears," and that said deafness was the cause of the losing the use of his left leg.

This claim was rejected by your office January 20, 1886, on the ground that "it appears that claimant's injury of leg was caused by being struck by a railroad engine while he was walking on a railroad track in the spring of 1880, and because claimant is now receiving the highest rate allowed by law for the disability for which pensioned."

From this action of rejection claimant appealed November 2, 1887, contending that his alleged injury to left leg was directly caused by the disability for which he was pensioned, and which was incurred in the service.

OPINION.

The evidence on file in support of this claim for increase of pension establishes the fact that the injury to the appellant's leg, upon which his claim for increase is based, occurred many years subsequent to his discharge, and was the result of an accident which he incurred by walking upon a railroad track as a matter of convenience to himself and for the purpose of saving distance in going from one point to another in the transaction of his business. He was struck by an engine and his leg broken. The deafness which he incurred in the service, and for which he is pensioned, prevented his hearing the approach of the train in time to avoid it.

It does not appear that claimant was in the employ of the railroad company. His being upon the track and in a position to be injured by the train was a matter entirely of his own volition, and the risk thereby incurred was for the sake of his own convenience. There is no dispute in regard to these facts, the appellant testifying to them as well as both of the witnesses whose affidavits are filed in support of this claim.

The questioned raised by this appeal is not a new one, the Department having formerly decided that a pension would not be granted for injuries or disabilities alleged to have been incurred by reason of, or produced by, a former disability incurred in the service, and for which the claimant is pensioned, unless it be clearly and satisfactorily shown that the accident resulting in the injury relied upon as the basis of claim was directly occasioned by the claimant's previously incurred disability and was not the result of negligence or of carelessness on the part of the claimant, nor the lack of that due care and caution which ordinary prudence would dictate should be exercised by one in a crippled condition or not in the normal enjoyment of all his faculties. (See cases of Mensing, Henry I, P. D., Vol. I, p. 336, and Pyle, Elizabeth T., *Id.*, p. 27.)

The last above-cited decision is one almost identical, both as to the facts and the questions involved, with the one now under consideration. In that case, the soldier and pensioner for total deafness in-

curred in his military service was an employé of the railroad company, and engaged at the time of the accident which caused his death in working for said company upon a bridge; but the Department held in said decision that it was incumbent on him, knowing his disabled condition, to have exercised that care and caution which ordinary prudence would dictate to a man in his situation, and that his failure so to do constituted such contributory negligence as rendered the cause of death the result of his own carelessness, and too remote from the injury received in the service to entitle him to pension. Much more does this line of reasoning apply to this case, wherein it is an undisputed fact that appellant's injury was received through his voluntary act in going upon the railroad track, as a mere matter of convenience in proceeding from one point to another, and not because of any necessity. A man afflicted as he was with total deafness is guilty of gross negligence, if found walking upon a railroad track when not compelled so to do; and the injury incurred thereby could not, under any circumstances, be ascribed to the disability that had been received in the service, in such manner as to entitle him to a pension therefor.

For the above reasons, your action of rejection in this claim is affirmed and the appeal dismissed.

DISABILITY SUBSEQUENT TO DISCHARGE.

GEORGE W. SAUNDERS.

Where there is an obvious cause existing subsequent to discharge, sufficient to show the origin of claimant's alleged disability, but no competent and reliable testimony, lay nor medical, to establish the origin of same in the service, the presumption will be maintained that said disability was due not to the service, but to the cause originating after claimant's discharge.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 21, 1888.

Herewith are returned the papers which accompanied your report of January 17, 1888, upon the appeal of George W. Saunders, late private Company M, Tenth Indiana Cavalry, from the action of your office rejecting his claim for pension.

Claimant enlisted February 3, 1864, and was discharged from the service August 31, 1865. He filed his declaration for pension June 15, 1880, alleging therein as the basis of his claim that "at Pulaski, Tenn., in August, 1864, he was thrown from a mule, and, at Decatur, Ala., in October, 1864, he was thrown from his horse while jumping a pit, both causing serious injuries." In a subsequent affidavit, filed October 31, 1882, he alleges that "at Pulaski, Tenn., in August, he was thrown from a mule, injuring his back, and at Decatur, Ala., in October, 1864, he was thrown from his horse while jumping a pit, injuring his back and hips."

The records of the War Department furnish no evidence of the alleged injuries, and the muster-rolls of claimant's company and regiment give no record of any injury, sickness, or absence, with the exception that he is reported absent without leave in July, 1865, during the whole time of his military service.

Since filing his declaration for pension, claimant has been medically examined (January 25, 1882) by a single surgeon, at Shoals, Ind., who certifies:

No physical disability apparent; no rating.

January 31, 1883, by board of surgeons, at Mitchell, Ind., who certified:

We find no physical signs of injury to back or hip, and rate nothing therefor; they find and rate one-fourth for rheumatism in knee and elbow.

March 12, 1884, by board of surgeons, Vincennes, Ind., who certified:

Nothing to indicate that he has sustained an injury to back or hips. We find nothing to base a rating on.

February 11, 1886, by board of surgeons, Washington, Ind., who certified:

We can find no lesion of spinal column; contour natural; muscular system in good nutrition; analysis of urine shows excess of phosphates, earthy and alkaline; all other tests negative; heart sounds normal; respiratory murmur clear over both lungs; stomach, liver, spleen, abdomen, and all joints, tendons, and muscles normal. There is no particular tenderness along the spinal column. We believe he has spinal irritation, probably the result of concussion sustained by a fall from a horse. While the physical signs are negative, the subjective symptoms all point to spinal irritation. Rate one-half for injury to spine.

The claim appears to have been subjected to a careful and exhaustive special examination in the field, with a view to ascertain, if possible, the facts as to origin of injury in service and line of duty, condition at discharge and since.

Upon a review of all the evidence in the claim, it was finally rejected by your office December 31, 1887, upon the ground that "injury to back and hips is not shown in the record, and special examination fails to show that same was received in the service and line of duty; and the evidence shows said injury to be due to an accident which occurred subsequent to soldier's discharge from the service."

From this action the appeal is taken.

OPINION.

This claim presents the single issue as to the sufficiency of the testimony produced to support the allegation of the appellant that he was injured in his back and hips in the service and line of duty.

The records of the War Department furnish no evidence of any injury, sickness, or absence (other than an absence without leave in July, 1865) of claimant during the whole period of his Army service, and report him present for duty, with the exception above noted.

Appellant alleges two distinct injuries of the back and hips; the one incurred in August, the other in October, 1864. As to the first injury, to which he ascribes the commencement of his subsequent disabilities, he has furnished no evidence whatever of its incurrence which could be accepted as satisfactory, the affidavit of a single comrade to the fact of incurrence (filed since the rejection of the claim and during the pendency of this appeal) being too general and unsatisfactory in character to be considered as having any weight, or as better than hearsay.

Claimant has failed also to furnish the testimony of any officer or comrade who witnessed the second accident, by which he alleges he was injured; and the evidence that is on file, tending to support his allegations, is that of persons who can testify to nothing more positive and circumstantial than appellant's own statements, made to them several hours after the alleged incurrence of the injury, and none of whom examined or saw the injured parts, or can state positively that any appreciable disability resulted therefrom in his subsequent service.

Appellant also fails to show any medical treatment for his alleged injuries in the service, admits that there was none, and that he did not apply to the surgeon of his regiment for treatment either at the time of the alleged incurrence of his injuries or during his subsequent service, which it is most reasonable to presume he would have done had said alleged accidents resulted in disabling him in a pensionable degree.

The testimony produced by appellant in support of his allegations, and obtained by special examination relative to his condition since discharge, is divided on the question of the existence or non-existence of a pensionable disability due to service. If such disability did result, it is not shown by competent and reliable testimony—certainly by no medical testimony—to have existed prior to the year 1877. It is proved, however, by the unimpeached testimony of two apparently disinterested and credible witnesses that, in the year 1875, a saw-mill, full of green slabs and lumber, in which the appellant was employed at the time, was precipitated with the appellant down an embankment 15 feet into a stream of water, and that appellant was seriously and dangerously injured, thereby necessitating his confinement to his bed and medical treatment for some time thereafter; that appellant asserted that his back and side had been injured, and subsequently ascribed to said accident the disabilities now alleged as the basis of his claim for pension.

In view of the facts in this claim as they are presented by the evidence, it certainly appears to be a more reasonable presumption that the slight disability which is shown by the medical evidence to have existed since 1882, and which was found upon the last medical examination by the board of surgeons at Washington, Ind., was due to the injury sustained by the appellant in 1875, than that its presence was owing to an alleged injury (not satisfactorily established) in 1864.

For the reasons above given the Department is of the opinion that the evidence in this claim is neither sufficient nor satisfactory for the purpose of establishing the incurrence of the alleged injury in the service and line of duty; and accordingly your action rejecting this claim upon the grounds stated by you is affirmed, and the appeal dismissed.

DISABILITY TOTAL—ACT OF AUGUST 4, 1886.

CHARLES W. STRUBLE.

In order that claimant may be entitled to $36 per month under the act of August 4, 1886, he must show that, by reason of his disability, he is totally disabled in either his leg or his arm, the provisions of the act being restricted to the *total disability* of one or of both of those members.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 27, 1888.

I return herewith to you the papers which accompanied the appeal of Charles W. Struble, late of Company F, Third United States Infantry, from the adverse decision of your office in his claim for increase of pension, certificate No. 25614.

The basis of this claim is the loss of left leg, also gun-shot wound of right thigh, alleged to have been incurred by reason of the service and in the line of duty.

Claimant's original declaration was filed January 6, 1864, alleging that he incurred wound of right leg below the knee and two gun-shot wounds of right leg above the knee in the battle of Gettysburgh, July 2, 1863.

Claimant has been granted increasing pensions as follows: At the rate of $8 per month from December 7, 1863; $15 from June 6, 1866; $18 from June 4, 1872; $24 per month from March 3, 1883, and $30 per month from January 27, 1886.

Claimant is now pensioned for amputation of leg and two gun-shot wounds of right thigh, and gun-shot wound of right leg, and resulting varicose veins of right leg, at the rate of $30 per month, as provided under the act of March 3, 1883.

Claimant now contends that, as he was receiving $30 per month prior to the act of August 4, 1886, his rating should be increased from $30 to $36 per month, inasmuch as said act increased the rate of those who were receiving $30 to $36 per month. The present rating of claimant was allowed January 27, 1886.

This appeal is taken from the adverse ruling of your office, whereby claimant was denied the rating of $36 per month.

OPINION.

In considering the merits of this appeal, it is proper to examine the *acts of March 3, 1883*, and August 4, 1886, and to ascertain the relation

of them to the grounds upon which the claimant's application is based, the contention of claimant being that, inasmuch as he was rated at $30 per month under the former act, he is now entitled to $36 per month, by virtue of the latter.

The act of March 3, 1883, under which claimant's rating was increased from $24 to $30 per month, so far as it is applicable to claimant, is as follows:

That from and after the passage of this act, all persons hereafter granted a pension who, while in the military or naval service of the United States, and in the line of duty, shall have lost one hand or one foot, or been totally or permanently disabled in the same, or otherwise so disabled as to render their capacity to perform manual labor equivalent to the loss of a hand or a foot, shall receive a pension of $24 per month; that all persons now on the pension rolls, and all persons hereafter granted a pension, who, in like manner, shall have lost either an arm at or above the elbow, or a leg at or above the knee, or shall have been otherwise so disabled as to be incapacitated for performing any manual labor, but not so much as to require regular personal aid and attendance, shall receive a pension of $30 per month.

The act of August 4, 1886, under which claimant contends that his rating should be increased from $30 to $36 per month, so far as it can affect the merits of this appeal, is as follows:

That from and after the passage of this act, all persons on the pension rolls, and all persons hereafter granted a pension, who, while in the military or naval service of the United States and in the line of duty, shall have lost one hand or one foot, or been totally disabled in the same, shall receive a pension of $30 a month; that all persons now on the pension rolls, and all persons hereafter granted a pension, who in like manner shall have lost either an arm at or above the elbow, or a leg at or above the knee or been totally disabled in the same, shall receive a pension of $36 per month, etc.

Now, comparing the provisions of the two acts under consideration, I find between them a marked and substantial distinction as applicable to the issue growing out of this appeal. In the light of that distinction it is perceived that, under the act of March 3, 1883, providing $30 per month, the claimant was entitled to an increase from $24 to $30, because it was shown that, in addition to the loss of his leg, he had been otherwise "so disabled as to be incapacitated for performing any manual labor." But it is likewise apparent that claimant was not subsequently entitled to an increase from $30 to $36 per month under the act of August 4, 1886, because, although disabled in his amputated leg as provided in the act of 1883, yet, he was not, as the act of 1886 requires, either "totally disabled in the same," or by reason of it; nor is there any satisfactory evidence in the accompanying papers to prove such total disability. It appears, furthermore, that claimant, though permanently disabled by reason of the amputation of his leg, does not pretend that he is so "incapacitated for performing manual labor" as to require "regular personal aid and attendance." In order that claimant may be entitled to $36 per month under the act of August 4, 1886, he must show that, by reason of his disability, he is totally disabled in either his leg or his arm, the provisions of the act being restricted *to the total disability* of one or of both of those members.

The distinction thus clearly maintained between the two acts cited by claimant in this appeal shows the fallacy of the contention on which the appeal itself is based, and demonstrates the fact that claimant is now fully rated in accordance with the law which is applicable to his case. I therefore approve the action of your office in rejecting the claim for increase, and dismiss the appeal.

ALTERCATIONS—LINE OF DUTY

ALEXANDER GILLESPIE.

1. The line or performance of military duty must sustain to the alleged casualty or injury the relation of cause, and the alleged disability must be the legitimate sequence of such cause in the service.
2. The fracture of claimant's skull by an enraged comrade in retaliation for an alleged personal offense can not be construed into a legitimate incident of the line of military duty, nor as having any proper relation thereto.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 20, 1888.

I herewith return to you the papers which accompanied the appeal of Alexander Gillespie from the action of your office adverse to his claim for increase of pension, certificate No. 277037.

Claimant enlisted in August, 1862, and was discharged from the service in July, 1865.

Claimant is already pensioned at $3 per month from February 16, 1882, for typhoid fever and for kidney and urinary affection.

An application for increase of pension, on which this appeal is partly based, was filed May 29, 1885, alleging the original diseases for which pension was granted, and resulting general disability, which was rejected because no pensionable increase was proved.

The application for increase now under consideration was filed September 2, 1886, alleging that, at Brashear City, La., during October, 1863, claimant incurred fracture of skull at the corner of left eye, caused by being struck with a piece of board in the hands of an enraged comrade. Claimant's own account of the alleged injury is contained in his affidavit, filed March 31, 1887, as follows:

> I was sitting on a bench cleaning my carbine when Henry Wise, of my company, but of another mess, made some remark about men for detail to load a boat, to the effect that if you leave out the non-commissioned officers and non-combatants there would not be many men for detail, and I added, "and the paroled prisoners," whereupon the said Wise flew into a passion and picked up a piece of board and struck me, producing an injury to the skull. * * * I am sure there was no provocation other than the said remark, which I made with no idea that I was giving offense.

The foregoing affidavit of claimant is substantially supported by the *evidence of several* comrades who were eye witnesses of the circumstances related by him; and, upon the evidence thus given, going to

show the origin of the alleged fracture, the claim for increase of pension was based; but it was rejected by your office for the reason that the said fracture of skull was not due to the line of duty in the service.

From this adverse action the present appeal is taken.

OPINION.

The claimant in this appeal bases his title to an increase of pension upon the ground that the fracture of skull which was produced by the blow received by him from an enraged comrade in the service, as detailed in the accompanying history of the claim, was incurred in the line of duty. But the claim was rejected upon the ground that the assault which was made upon claimant by the comrade, as alleged, was *not* due to the service in the sense that conveys title to pension.

This appeal raises the inquiry as to whether a personal controversy, an assault, or a rencounter between two soldiers in the service can be ascribed to the line of duty, without reference to the blameworthiness of either party for either the beginning or the result of the same.

This inquiry has in different forms received the consideration of the Department, and in each instance the decision has been adverse to the claimant. In the case of David Smith, application No. 182216, the Department affirmed the ruling of the Commissioner of Pensions to the effect that "soldiers injured or disabled in personal altercations and personal quarrels can not be considered in the line of duty, and no pension, therefore, will be allowed for such injuries or disabilities;" and in the case of Joseph W. Stanley, application No. 468694, the ruling in the case of David Smith was re affirmed. More recently, in the case of W. H. Brokenshaw (see P. D., Vol. I, p. 194), the Department held that, "where soldier received an injury caused by comrades jumping on him while he was climbing into his bunk," the injury was not, "in contemplation of law, incurred in the line of duty in the sense that would carry with it the right to pension."

The rulings thus indicated are based upon the doctrine that the line or performance of military duty must sustain to the casualty or the injury alleged the relation of cause, and that the disability must be the legitimate sequence of such cause in the service. Tested by this principle, the claim out of which grows this appeal evidently lacks the pensionable quality. The fracture of claimant's skull by an enraged comrade, in retaliation for an alleged personal offense, can not be construed into a legitimate incident of the line of military duty, nor as having any proper relation thereto. It was a misfortune for which the service should not be held in any degree responsible, and to which, therefore, the pension laws do not apply.

Taking this view, in consistency with former rulings of the Department, I approve the *rejection* of the claim for increase and dismiss this *appeal.*

RECONSIDERATION.

CHAMBERS C. MULLIN.

The Department holds that old cases, long since adjudicated by previous administrations, will not be re-opened, nor reconsidered, nor re-adjusted upon the mere allegation of the pensioner that proper weight had not been given to the evidence in the original adjudication. It will be done only upon conclusive and palpable evidence of error.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 15, 1888.

Herewith are returned the papers which accompanied your report of February 7, 1888, upon the motion for reconsideration of departmental decision in the claim for re-rating of Chambers C. Mullin, late private Company G, Second Pennsylvania Volunteers, Mexican war.

The paper filed by claimant October 10, 1887, appears to have been erroneously treated as in the nature of an appeal, and to have been referred to you as such and reported upon by you.

The claim was originally made for a re-rating of claimant's pension for the period from April 11, 1879, to February 4, 1881. This claim was rejected by the honorable Commissioner of Pensions, and, on appeal to this Department, said rejection was affirmed by the honorable Secretary of the Interior in a departmental decision dated February 18, 1882. Since said date no new evidence has been filed, and no step has been taken by you looking to a re-opening of the claim.

The paper filed in the Department October 10, 1887, is in the nature of a motion for a review and reconsideration of the aforesaid departmental decision, and will be so treated.

Claimant bases his motion for reconsideration upon the belief that the evidence on file in support of his claim was not properly considered, and was not before the Department when the aforesaid decision was rendered. He does not claim to be in possession of any new and material evidence which, if presented at the time, would have changed the aforementioned decision, nor does he either allege or point out any error of law, or mistake of fact committed in the former adjudication of his claim. The assumption upon which he bases his motion for reconsideration is completely rebutted by the papers in the case, and by your report upon his appeal, showing that the particular medical evidence referred to in said motion *was*, in fact, before the Department, and *was* duly considered when the aforesaid decision was rendered.

The rule of the Department in such cases has been clearly stated in numerous decisions, and is well settled. In the case of Tyner, Noah N. (1. P. D., p. 21), it was held:

On application for re-rating, a former adjudication of the Department will not be disturbed except upon the most conclusive evidence that error was committed therein.

Again, in the case of Hoyt, Birney (1. P. D., p. 70), the rule was held to be—

Old cases—long since adjudicated by previous administrations—will not be re-opened, reconsidered, or re-adjusted upon the mere allegation of the pensioner that proper weight had not been given to the evidence in the original adjudication. It will be done only upon conclusive and palpable evidence of error or mistake.

In accordance with the foregoing established rulings of the Department the motion of claimant is overruled, and the reconsideration of said decision denied.

CIVILIAN EMPLOYÉS, NON-PENSIONABLE.

JOHN F. DISSMAN, LATE TEAMSTER.

The act of January 29, 1887, granting pensions to the soldiers and sailors of the Mexican war, provides a service pension for only the surviving officers and enlisted men of that war; and where the claimant was not an enlisted man, but only a civilian employé of the Quartermaster's Department, serving in the capacity of a teamster, the provisions of said act are not applicable.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 15, 1888.

Herewith are returned the papers which accompanied your report of February 7, 1888, upon the appeal of John F. Dissman, late teamster, Quartermaster's Department, U. S. Army, Mexican war, from your action rejecting his claim for survivor's pension on account of alleged service in the Mexican war.

It appears from the records of the War Department that claimant was employed as a teamster by the Quartermaster's Department, U. S. Army, during the Mexican war, from January 6, 1847, to August 21, 1847.

The Quartermaster-General stated, December 20, 1855:

John F. Dissman is reported as teamster by Capt. G. H. Crossman, assistant quartermaster, U. S. Army, from January 6 to February 8, 1847, and transferredto G. P. Smith, who does not report him. Capt. J. P. J. O'Brien reports him as hostler from July 30 to August 21, 1847, and discharged.

He filed his declaration, claiming a pension under the provisions of the act of Congress approved January 29, 1887, alleging therein that he served as teamster in the war with Mexico; that he entered the service at New Orleans, La., in 1846, for the term of six months, and was honorably discharged at Monterey, 1847; that he actually served sixty days with the Army or Navy of the United States in Mexico, or on the coast or frontier thereof, or en route thereto, in the war with that nation; that he was actually engaged in the battle of Buena Vista, and is now sixty-two years of age.

The claim was rejected November 4, 1887, on the ground that "claimant was a civilian employé in the Quartermaster's Department, and not an enlisted man in the military or naval service of the United States."

It further appears from the records that claimant was granted a bounty-land warrant, No. 19409—160—55, under the provisions of the act of Congress approved February 11, 1847.

From said action of rejection claimant appealed December 20, 1887, contending that he had been recognized by the Government as an enlisted man by reason of having been granted a bounty-land warrant, and that he had been actually engaged in the battle of Buena Vista and was, therefore, entitled to pension under the law.

OPINION.

This is a claim for pension on account of service during the Mexican war under the provisions of the act of Congress approved January 29, 1887.

It appears from the record evidence, as well as from the allegations of the declaration for pension, that appellant was employed as a teamster by the Quartermaster's Department of the U. S. Army during the war with Mexico.

Since it is admitted that appellant was employed as a teamster and served as such until discharged, the only question to be decided herein is, does such employment entitle him to the benefits of the act of Congress of January 29, 1887?

Appellant contends that he was placed upon the same footing as that of an enlisted man in the military service of the United States, and heretofore recognized as such by the Government by reason of having been granted a bounty-land warrant, which the record shows he received for services in the Mexican war under the provisions of the act of Congress approved February 11, 1847.

The claim presents a similar state of facts and is precisely analogous to the case of Tate, Samuel P., No. 10409 (P. D., vol. 1, p. 449), decided by the Department December 9, 1887. In the exhaustive opinion rendered upon the decision of said case, the identical questions raised by this appeal were discussed, as follows:

The act of January 29, 1887, provides that "when any person has been granted a land warrant under any act of Congress for and on account of service in the said war (with Mexico), such grant shall be prima facie evidence of his service and honorable discharge; but such evidence shall not be conclusive, and may be rebutted by evidence that such land warrant was improperly granted."

But the act of January 29, 1887, granting pensions to the soldiers and sailors of the Mexican war, provides a service pension for only the "surviving officers and enlisted men" of that war; and, inasmuch as the claimant in this appeal was not an enlisted man, but only an employé of the Quartermaster's Department, serving in the capacity of teamster, the provisions of said act are not applicable to him, and therefore a pension can not be lawfully granted to him for the service which he performed. The bounty-land warrant which was granted to claimant in 1855 was conferred, not by reason of his enlistment as a soldier in the Mexican war, but by reason of the fourth paragraph, section 2426, of the bounty land laws revised and consolidated by act approved June 22, 1874, under which wagon-masters and teamsters who have been employed under the direction of competent authority, in time of war, in the trans-

portation of military stores and supplies, may be granted bounty-land warrants. The law having reference to granting pensions makes a broad and clear distinction between civilian employés, such as claimant was, in the Quartermaster's Department, and "enlisted men" in the military service.

It is manifest, for the reasons set forth in the departmental decision above quoted, that the appellant is not entitled to a pension by virtue of the provisions of the act of January 29, 1887. Your action in rejecting this claim is accordingly affirmed, and the appeal dismissed.

RES ADJUDICATA.

EDWARD A. COLNOR.

Repeated appeals of the same claim, based upon the same or upon merely cumulative evidence which does not and can not affect the status of the claim itself, are inconsistent with the spirit and purpose of honest litigation, and must be halted by the doctrine of *res adjudicata*, the fair and vigorous application of which facilitates the business of the Department and promotes the aims of justice in administering pension legislation; and, hence, the Department will not overturn nor reconsider the adjudication of a claim decided by the present or by the former administration, except upon the production by claimant of an overshadowing reason.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 9, 1888.

Herewith are returned the papers which accompanied your report of January 30, 1888, upon the appeal of Edward A. Colnor, late private Company I, New York Heavy Artillery, from your action rejecting his claim for invalid pension.

This claim was rejected by your office on April 4, 1885, on the ground that the claimant had failed to prove that he received the alleged sunstroke during his military service, or that he had been disabled by the results thereof during the period subsequent to the date of his discharge.

The claimant appealed from this action, and, on July 15, 1886, the Department affirmed said action and dismissed said appeal in an exhaustive opinion thoroughly discussing the evidence filed in support of the claim, and stating the ground of its action.

No motion for a reconsideration of said action was filed with the Department, but it appears that, in January, 1887, the claimant filed the affidavits of two comrades tending to show the incurrence of the alleged sun-stroke in the service, which were considered by your office, but, as stated in your report, were not deemed sufficient to change the status of the claim.

The claimant then, on December 13, 1887, filed a second appeal from the original action of rejection.

OPINION.

This claim is now here on appeal in a wholly irregular and improper manner.

It appears to have been before the Department on a former occasion, upon appeal from the same action of rejection and involving precisely the same questions. Upon the former appeal your action of rejection was carefully reviewed, the claim thoroughly considered, and the views of the Department thereon embodied in an opinion affirming your action of rejection and *finally deciding the case.*

So far as the questions treated of in said opinion and passed upon by the Department are concerned, they became and are *res adjudicata*, and can not now be disturbed or reopened.

If the appellant believed that injustice was done him by the former decision, or has come into possession of new and material evidence which he was unable to produce in the previous adjudication of his claim—such evidence as would have warranted a favorable decision in the first instance—or could point out any mistake of fact, or error of law, committed in said decision, evidence which, if known at the time, would have changed the status of his claim, he should have applied to the Department by a motion for a rehearing and review of said decision, seeking to have the same set aside and annulled before again appealing from the action of your office, and upon the same points. The rule of the Department has been clearly and well expressed in the case of Gordon, Morgan (I. P. D., p. 188), as follows:

> The foregoing fact furnishes the Department an opportunity to call attention to the importance of defining and adhering to a rule that shall be applied as uniformly as possible to the restriction of appeals from the rejection of the same claim. The Department, impelled alike by a love of justice and the sense of duty, is disposed to give the most patient and generous consideration to all appeals; but claimants and their attorneys are reminded that, after a claim has been rejected by the Commissioner of Pensions and, on appeal, decided adversely by the Department, a reconsideration of the same upon a second appeal to the Department is justified upon the ground only that, in the former decision, a manifest error was committed, or that new, material and important evidence—such as would have warranted a favorable decision in the first instance—is produced by claimant—new, material, and important evidence which, as it may appear, claimant had failed to procure even at the expense of proper diligence. This rule is obviously essential in order to avert the overcrowding of the Department with groundless or necessarily fruitless appeals, the consideration of which impedes or obstructs the progress of meritorious claims to a prompt adjustment. Repeated appeals of the same claim, based upon the same, or upon merely cumulative, evidence which does not and can not affect the status of the claim itself, are inconsistent with the spirit and purpose of honest litigation and must be halted by the doctrine of *res adjudicata*, the fair and vigorous application of which facilitates the business of the Department and promotes the aims of justice in administering pension legislation; and, hence, the Department will not overturn nor reconsider the adjudication of a claim decided by the present or by a former administration, except upon the production by claimant of an overshadowing reason.

A moment's consideration of the additional evidence of two comrades *filed, by appellant* since the rejection of his claim and the former

adverse decision of the Department, is sufficient to fully exhibit the lack of merit in this appeal. Both of said affidavits are on the same point as that passed upon in the former decision of the Department, and are open to precisely the same objections, on account of insufficiency to establish the origin of the alleged sun-stroke, as were made in the former departmental decision respecting the affidavit of appellant's captain on the subject.

It is clear that the questions raised by this appeal are completely covered by the rule of the Department above quoted, and does not present ground for further discussion.

Your action of rejection is accordingly affirmed, and the appeal dismissed as without merit.

PROOF OF ORIGIN.

EDWIN H. BONTON.

1. Where claimant's statements are the only direct verbal evidence showing the origin of alleged disabilities in the service and line of duty, they can not be accepted to establish incurrence unless corroborated and sustained by all the circumstances in entire accordance with the statements of the record.
2. A certificate of disability whereupon a soldier was discharged is held to contain a description of all the disabilities with which the soldier was suffering in the service and which rendered him unfit for duty at the time it was issued; and this presumption will obtain until overthrown by positive, direct, and conclusive evidence.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 7, 1888.

Herewith are returned the papers which accompanied your report of January 30, 1888, upon the appeal of Edwin H. Bonton, late corporal Company B, Eleventh New York Cavalry, from your action rejecting his claim for invalid pension, No. 434993.

Claimant enlisted December 18, 1861, and was discharged from the service January 9, 1863.

He filed his original declaration for pension December 10, 1881, alleging therein as the basis of his claim that, "at Poolville, Md., in September or October, 1862, while carrying a dispatch to picket line, near midnight, his horse stumbled and threw him forward on the pommel of his saddle, injuring the cord in left groin and producing hydrocele."

The records of the War Department show that claimant is reported on the roll for September and October, 1862, as "present under arrest," and that he was discharged January 9, 1863, on a surgeon's certificate of disability, which states that claimant is "incapable of performing the duties of a soldier because of valvular disease of the heart, not present at enlistment, attended with dyspnœa."

Claimant has been medically examined by the board of surgeons at New York City, November 1, 1882, who rate him one-fourth total for

disability, caused by hydrocele as alleged; and also by the board of surgeons at same place, March 3, 1886, who rate one-half total for "disability caused by hydrocele of cord, left side."

The claim was rejected April 10, 1886, upon the ground of there being no record of the alleged hydrocele, and no evidence on file showing that the same was incurred while the appellant was in the line of his military duty, and that he had acknowledged his inability to furnish necessary proof to cover said point of origin.

From said action of rejection claimant appealed, December 20, 1887, contending that his claim has been fully established by secondary evidence, and, as it has been shown to be impossible to procure primary evidence, said secondary evidence with his own statement should be accepted to establish incurrence in the service.

OPINION.

This claim presents a simple case of failure of proof and of acknowledged inability on the part of appellant to establish by the requisite legal evidence the incurrence of his alleged injury in the service and in line of duty.

Appellant's own statement as to the circumstances of incurrence is in fact the only positive testimony on the subject, the knowledge of his officer, whose affidavit is filed in support of his allegations, having been confessedly derived from statements of the appellant and from general rumor with regard to appellant's injury. The contention of the appellant that his own statement and the secondary evidence produced should be accepted as sufficient to establish the incurrence of his injury, as alleged, since it is shown by the circumstances to be impossible to establish the same by primary or the best evidence, is wholly untenable, first, because hearsay is not secondary nor any kind of evidence, and, secondly, because the statements of appellant are not consistent with the facts shown by the record.

Before the statements of appellant alone can be accepted as sufficient to establish incurrence they must be sustained and corroborated by all the surrounding circumstances, and must be in entire consonance with the statements of the record. (See case of Richards, John, 1 P. D., p. 235.)

The record shows that appellant was discharged upon certificate of disability as made out by the surgeon of his regiment, who, he alleges, treated him for his alleged disability, and from whom his officer states he received part of his information concerning the same. The surgeon, however, states in said certificate that appellant is entitled to his discharge by reason of disability caused by *valvular disease of heart* attended with *dyspnœa*, or difficulty of breathing, and makes no mention of the alleged injury resulting in the hydrocele for which pension is herein claimed. In the case of Wescott, Alonzo F. (1 P. D., p. 316), the Department held that such a certificate should be considered as contain-

ing a description of *all the disabilities* with which the soldier was suffering and which rendered him unfit for duty at the time it was issued, and that this presumption would obtain until overthrown by positive, direct, and conclusive evidence.

It follows in this case, as a necessary consequence of said decision, that the appellant was not disabled by said alleged injury at the date of his discharge. As he is unable to produce any proof to the contrary, as he makes no claim for pension on the basis of the disabilities mentioned in the certificate of disability, and offers no proof to sustain such a claim, it is manifest that the rejection of his claim was proper.

Your action rejecting this claim, upon the grounds stated by you, is accordingly affirmed and the appeal dismissed.

INCREASE.

ZIBA YARNELL.

The Department will accept, as conclusive of purely medical questions, the opinions of the medical referee in preference to those of family physicians, the conclusion of the former being received much the same as expert testimony in a court of law.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 6, 1888.

Herewith are returned the papers in the claim for increase of pension No. 172933 of Ziba Yarnell, Sixth Ohio Light Artillery.

Appellant is now on the roll of pensioners for injury to back, at the rate of $30 per month. His application for increase by reason of resulting loss of left leg was rejected June 11, 1883, upon the opinion of the medical referee, and adhered to on February 11, 1887.

From this action the appeal is taken.

The medical referee, under date of January 16, 1888, states:

There is no apparent connection between the injury to back, for which the soldier was pensioned, and the disease of left knee joint, which necessitated amputation of thigh.

In the appeal filed in this case by the claimant's attorney, the Department is requested to carefully review the evidence of the physicians who have testified in claimant's behalf. This has been done, but no reason appears after this careful review for overturning the conclusions of the medical referee, the highest medical officer of the Department. Upon his conclusions the Department is compelled to rely, his deductions being accepted much the same as expert testimony in a court of law. This practice has been founded upon sound precedents, and has commended itself to the *good* sense and reason of the attorneys themselves. *The precedent* peculiarly applicable to this case is that of Jos. *F. Ennis, found in volume* 1, Pension Decisions, page 127, wherein

it is held that section 4776 of the Revised Statutes of the United States gives to the medical referee the right to examine, revise, and construe the reports of the examining surgeons, as well as the medical testimony found in a pension claim, and upon his opinion, made after such a review of the medical evidence, the Department will rely in preference to the opinions of family physicians. Where any reason is shown by the testimony on file, or any sound reason otherwise presented, whereby error or mistake in the aforesaid conclusions may be inferred, the Department will cheerfully remedy the error. As no error appears in this case nor any reason to discredit the soundness of the medical conclusions above recited, the Department adheres to the rejection of the claim, and dismisses this appeal.

CERTIFICATE OF DISABILITY.

ADAM CUTTS.

1. The record made of treatment in hospital during service is presumed to be correct as showing all the diseases and all the treatment which claimant had during his army service, and it is presumed furthermore that he was not treated for any disease other than that stated; and these presumptions will obtain until the contrary is established by competent evidence.
2. A contemporaneous record can not be overthrown by the affidavit of a surgeon, made from memory more than twenty years subsequent; and especially will such be the case where the certificate of disability is corroborated by the utter silence as to the disease in question, or any treatment therefor, in the hospital record.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 6, 1888.

Herewith are returned the papers which accompanied your report of January 25, 1888, upon the appeal of Adam Cutts, late private Company D, Seventy-fifth Indiana Volunteers, from your action rejecting his claim for invalid pension.

Claimant enlisted December 11, 1863, and was discharged from the service on surgeon's certificate of disability, October 4, 1864. He filed his declaration for pension July 28, 1885, alleging therein, as the basis of his claim for pension, that while in line of duty at Chattanooga, Tenn., about March, 1864, from severe exposure he contracted chronic diarrhea, which has resulted in piles and hernia.

The Adjutant-General states that claimant is reported on roll for January and February, 1864, "present"; on roll for March and April, 1864, "absent, sick in hospital," and is so reported to August 31, 1864. Company returns for April, 1864, show him sent to hospital March 3, 1864.

The Surgeon-General reports: Claimant entered general field hospital at Chattanooga, Tenn., February 29, 1864, with "hemorrhoids," *and was transferred* March 8, 1864; entered Cumberland General Hos*pital at Nashville,* Tenn., March 9, 1864, with "hemorrhoids"; was

transferred March 19, 1864; was admitted to Brown General Hospital at Louisville, Ky., March 20, 1864, with "aortic regurgitation and hemorrhoids," and transferred March 31, 1864; was admitted to general hospital at Madison, Ind., April 1, 1864, with "dyspepsia"; was furloughed May 12, 1864; readmitted June 6, 1864; and discharged from service October 6, 1864, by reason of "dyspepsia."

In certificate of disability upon which claimant was discharged, the surgeon in charge of the general hospital at Madison, Ind., stated September 8, 1864:

> During the last two months said soldier has been unfit for duty sixty days. * * * Adam Cutts joined the regiment as a recruit, but was never able to perform any duty. His disease was not contracted in the Army.

In same certificate, Dr. D. W. Flora, acting assistant surgeon, U. S. Army, stated that he had examined the claimant and found him incapable of performing the duties of a soldier because of "dyspepsia of an obstinate character, with hemorrhoids (piles) of twenty years' standing. He has severe functional derangement of the heart. This soldier *admits* the existence of the above diseases prior to enlistment. Degree of disability three-fourths. Unfit to enter or re-enlist in Veteran Reserve Corps."

Claimant was medically examined by the board of surgeons at Indianapolis, Ind., September 9, 1885, who certify "he has no hernia," and rate him total for disability from chronic diarrhea and piles, and total for varix.

The claim was rejected September 17, 1886, as to hernia and diarrhea, on the ground that there is no record or other competent evidence of origin in service and line of duty; and, as to dyspepsia and piles, on the ground of prior unsoundness, as shown by the record.

Since the above action of rejection claimant has filed some additional testimony, which has been duly considered and found insufficient to warrant a reconsideration of his claim.

From said action of rejection claimant appealed December 15, 1887, contending that it is reasonably well shown that the chronic diarrhea originated in the service about the month of March, 1864, eighteen months after the soldier enlisted; that it is reasonably well shown that the piles or hemorrhoids are due to the chronic diarrhea; that the other sequences—rupture and heart disease—may well be regarded as due primarily to chronic diarrhea, though possibly not proved in a proper manner; that there is a ruling in existence looking to the acceptance of the presumption that a disability originated in the service if, prior to its appearance, the soldier had served six months.

OPINION.

The appellant bases his claim for pension upon chronic diarrhea, resulting *in piles and hernia*, which, as alleged, he contracted in the *service in March, 1864.* Dyspepsia and heart disease also are incident-

ally claimed as resultants in subsequent affidavits. The records of the War Department show the appellant to have been sick and sent to hospital about the date of the incurrence of his alleged disability, and the report of the Surgeon-General gives a very complete record of the treatment of appellant in the various hospitals of which he was continuously an inmate until he was discharged from the service.

It does not appear that claimant entered any one of the aforesaid hospitals, or was treated therein, for either the diarrhea or the hernia alleged; but, on the contrary, continuous treatment is shown from the time of his entrance into the general field hospital at Chattanooga, Tenn., about March 1, 1864, to his discharge from the general hospital at Madison, Ind., on October 6, 1864, for hemorrhoids, with occasional treatment for heart disease and dyspepsia in connection therewith.

Appellant was discharged from the service upon a certificate of disability signed by the surgeon in charge of the hospital at Madison, Ind., and by the surgeon who treated him in said hospital. The substance of said certificate is set out in full in the foregoing statement of facts, and is to the effect that, by appellant's own admission, the diseases for which appellant was treated in hospital and for which he was discharged from the service, to wit, dyspepsia, hemorrhoids (or piles), and affection of the heart, had all existed prior to enlistment. With the exception of an affidavit of Surgeon Flora, made in March, 1887, there is no medical evidence on file in the claim showing the existence of or treatment for chronic diarrhea prior to 1870.

The state of the record as above set forth brings this case clearly within the rule which has been maintained by the Department in a long line of decisions, prescribing the force and effect which shall be given to such an adverse hospital record as is here presented with reference to the disabilities of chronic diarrhea and hernia, and also, to the conclusive weight to be attached to the statements contained in the certificate of disability, upon which the appellant was discharged, as to the origin of the remaining disabilities as alleged.

The position maintained by the Department is well and clearly stated, accompanied by a full citation of decisions bearing on the subject, in the case of Luther Ellis (1 P. D., p. 387), wherein it is held that—

"The record made of treatment in hospital during service is presumed to be correct, as showing all the diseases and all the treatment which claimant had during his Army service, and it is further to be presumed that he was not treated for any disease other than that stated; and these presumptions will obtain until the contrary is clearly and satisfactorily established by competent evidence."

The Department also holds, with great emphasis, that—

"The statements contained in the certificate of disability, upon which the soldier was discharged from the service, shall be taken as fully establishing the facts therein stated, unless fraud or mistake be apparent from the face of the certificate itself, or *clearly established* by the most positive and conclusive evidence."

The mere statement of the foregoing well-settled rule of the Department, *as completely* covering every disability alleged, and every ques-

tion involved in this claim, would appear to make further argument unnecessary; but, inasmuch as one of the surgeons (Dr. Flora), who signed the certificate of disability upon which appellant was discharged, makes an affidavit in March, 1887, tending to contradict the statements formerly made by him in said certificate, and stating that chronic diarrhea was the most prominent disease in appellant's case while an inmate of the hopital at Madison, Ind., it may be well to repeat what was held by the Department in the case of Boyle, James (1 P. D., p. 149), that "a contemporaneous record," such as this certificate of disability, "can not be overthrown by the affidavit of the surgeon, made from *memory* more than twenty years subsequent," and more especially will such be the case when the statements of the certificate are corroborated by the utter silence as to that disease, or of any treatment therefor, in the hospital record of appellant's disabilities, made at the same time.

The rule contended for by the attorneys of appellant, that service for six months prior to the incurrence of disability without hospital record is conclusive of prior soundness can have no application to the present claim, since the record shows that appellant's whole term of service was less than ten months; that for more than seven months of said time he was in general hospital for treatment; and that he was never able to perform military duty at any time.

For the reasons above given, your action rejecting this claim upon the ground stated by you is affirmed, and the appeal dismissed.

NEW EXAMINATION—CONTRIBUTORY NEGLIGENCE.

GEORGE SOLOMON.

1. While the Department adheres to the policy of granting a new special examination, affording claimant an opportunity to cross-examine witnesses in all cases where the evidence obtained by the old *ex parte* system is material to the proper determination of the claim, yet, it would be absurd to extend the policy to claims wherein such new examination can have no effect upon the ultimate decision.
2. Where either a disability or a death is the result of gross carelessness, the doctrine of contributory negligence applies, and consequently no title to pension follows.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 30, 1888.

Herewith are returned the papers which accompanied your report of January 12, 1888, upon the appeal of George Solomon, late private Company E, First Arkansas Cavalry, from the action of your office rejecting his claim for pension.

Claimant enlisted June 9, 1862, and was discharged from the service August 23, 1865. He filed his declaration for pension December 30, 1874, alleging as the basis of his claim that "while on a raid after General *Joe Shelby in October, 1864*, his horse fell with him, and, in the fall, *he was badly ruptured* and his skull badly cracked and nerves affected."

In a subsequent declaration, filed March 29, 1878, he states that "the rupture, on account of which he claims pension, is on the left side."

The records of the War Department show the enrollment, the army service, and the discharge of claimant, as above stated, and that he was "left sick at Newtonia, Mo., October 6, 1863. Company left Cassville, Mo., September 26, 1863, marched to Fayetteville, Ark., marched from Fayetteville October 3, 1863, and was constantly engaged in the pursuit of Colonel Shelby until October 31, 1863. Records on file furnish no evidence of injury as alleged."

Claimant was medically examined March 23, 1878, at Mount Vernon, Mo., by a single surgeon who certifies that he has a single uncomplicated hernia, left side, and rates him one-half therefor, but fails to find injury to head as alleged.

The claim was specially examined in the field, with a view to ascertain if said alleged injuries were incurred in line of duty in the service, and, upon the return of the testimony so obtained, the claim was rejected June 17, 1880, on the ground that "hernia and alleged injury were not received in line of duty."

Since said action of rejection the claimant filed several affidavits tending to show that he was in line of duty at the time of the alleged incurrence of his injuries, contradicting some of the testimony obtained by the special examiner, but, upon considering the same, it appears that said additional evidence was not deemed sufficient to warrant a change of action, and, on November 18, 1887, the action of rejection was finally adhered to.

From this action of rejection the claimant appealed November 23, 1887, contending that the testimony adverse to his claim, upon which said action of rejection is based, was obtained under the old system of special examination, *ex parte*, with no opportunity afforded him to face and cross-examine the witnesses, and that by said rejection of his claim he is denied the right of so doing, which is accorded by the present system, and that he should be accorded at least a new special examination.

OPINION.

The contention of appellant in this claim appears to rest mainly upon the fact that the testimony on file adverse to his title to pension, and upon which your action rejecting his claim was based, was procured by a special examination, conducted in the *ex parte* manner that formerly obtained in such proceedings, by reason of which the appellant was denied an opportunity to appear and cross-examine the witnesses who were called to testify for or against him, and that he is therefore entitled, without question, to a new special examination under the present system.

While it has been, and is, the settled policy of your office and of the *Department to grant* a new special examination, affording to the claim*ant an opportunity* to meet and cross-examine the witnesses who tes*tify, in all cases* where the evidence obtained by the old ex parte system

is material to the proper determination of his claim, yet, it would be manifestly absurd to extend such a policy to claims in which, from the nature of the case, such new examinations can have no effect upon the ultimate decision.

If the privilege of appearing in person or by attorney, and facing and cross-examining the witnesses who testify, could not possibly avail the appellant to his advantage in the adjudication of his claim, then, the denial of it, as shown in the accompanying papers, could not deprive him of any right in such manner as would, for that reason alone, justify a reversal of said action by this Department.

That no injustice has been done to claimant by such action, an examination of the evidence on file will clearly disclose, for every particle of the testimony taken by the special examiner, except the statement of the appellant, and those of his wife and other members of his family, given in the presence of the appellant, may be eliminated from the consideration of the claim, and enough would remain to fully sustain your rejection of it.

Appellant can not contend that his own statement was *ex parte*, and he testifies before the special examiner, as to the incurrence of the injuries alleged, in substance, as follows: That, in October, 1863, near the town of Newtonia, Mo., early in the morning, just as his command was about to march, his horse being without shoes, he was directed by one of his officers to go back to Newtonia and have his horse shod; that he started in company with a comrade, one Baize, several others following behind, and proceeded to the town in a "full run;" that he and said Baize "were fooling with each other, striking and wrestling and going along carelessly;" and, in passing a fence, a hog jumped out and his horse ran over it, turning a somersault, throwing him violently to the ground and rendering him insensible; was left at Newtonia; lay there for five or six weeks, and was then taken home. Had no rupture up to this time, the only damage caused at the time of the fall being an internal injury of the head. When he came home he felt dizzy and could not walk straight, and one day, while attempting to chop some wood, his mind not being clear, he ruptured himself on the left side, and has ever since been ruptured. He believes rupture came from the fall, but says this is a question of opinion; that his general health is good and the only trouble he has is from headache.

The testimony of appellant's wife, taken by the special examiner in appellant's presence, corroborates his statement as to the incurrence of his rupture. There is not a particle of evidence tending to show that the above statement, taken by a sworn officer of the Government, was incorrectly reported by him, nor to indicate any prejudice or undue bias against the appellant's claim on the part of the special examiner. It remains on file uncontradicted and unimpeached by any of the remaining testimony *produced in support* of the claim, and is strongly corroborated *in certain particulars* by the testimony of the other witnesses. *Taking, then, this statement* of the appellant alone, it is clear that, ad-

mitting he had been ordered by his officer to go and have his horse shod, as he alleges, he was obeying said order in a manner contrary to the regulations of the service, and was not in line of duty at the time of the incurrence of the injury. He admits that he was going in a "full run," and, at the same time, that he and a comrade "were fooling with each other, striking and wrestling and going along carelessly," when the accident occurred.

Can it be doubted that this heedless conduct, this gross disregard of ordinary prudence, was the cause of the accident?

Will it be seriously contended that a soldier obeying a command in this manner was acting in the line of duty?

The fact that appellant was not in the line of duty at the time of the accident to which he ascribes his injuries is too apparent from his own statement to admit of serious discussion; nor is it necessary to do more than allude to the fact that the incurrence of the alleged rupture of left side is conclusively shown, by the admissions of appellant and by the testimony of his wife, to have taken place at appellant's home at a time when he was absent from his command, and as the result of labor in no manner connected with nor incident to his military service.

In a case in which the facts presented by the appellant's own statement are unquestionably conclusive against the allowance of his claim, it is not considered necessary to cite the numerous decisions of the Department pointing out the circumstances under which a soldier will be considered as in line of duty when his injuries were received, and prescribing the general rule to be followed in such cases.

Your action rejecting this claim upon the ground stated by you is accordingly affirmed, and the appeal dismissed.

CONTRIBUTORY NEGLIGENCE.

PHEBE, WIDOW OF CLARK J. CASTALOR.

1. To establish a claim for increase of pension by reason of secondary or contributory cause of disability, claimant must clearly prove, by competent and satisfactory evidence, that the accident resulting in the injury relied upon as the basis of his claim was directly occasioned by his previously incurred disability and was not the result of negligence, or carelessness, or risk on his part, nor of a lack of that care and caution which should be exercised by one in a disabled condition.
2. Where a person voluntarily places himself in a position of peril or of hazard he thereby takes upon himself all the risks so incurred, and is alone responsible for any injury that may result therefrom.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 31, 1888.

Herewith are returned the papers which accompanied your report of *January 25, 1888,* upon the appeal of Phebe Castalor, widow of Clark *J. Castalor, deceased,* late a private, Company B, Thirty-fifth Ohio Volunteers.

The soldier enlisted August 9, 1861, and was discharged from the service August 26, 1864.

The records of the War Department show soldier's enrollment and discharge, as above stated, and that he was reported present for duty upon the rolls during the whole time of his army service, and furnish no evidence of any injury or disability.

Soldier was married to the claimant January 6, 1869, at Clinton, Ind.

The soldier died September 10, 1881, having been struck and killed by an express train when walking on the railway track at night.

The claimant, his widow, filed her declaration for pension September 10, 1886, alleging as the basis of her claim that soldier's hearing became impaired during and by reason of his military service, the disability being caused by the bursting of a shell at the battle of Chickamauga on September 19, 1863, and that, on the 10th day of September, 1881, while soldier was walking on the track of the Cincinnati, Richmond and Chicago Railroad, after his day's work, early in the evening, he was run over and killed by reason of the aforesaid deafness.

The claim was rejected April 1, 1887, on the ground that the death of the soldier by said accident was not due to his military service.

From said action of rejection claimant appealed December 13, 1887, contending that the testimony filed in support of the claim conclusively proves that soldier's death was caused by his being so deaf as not to be able to hear the approaching train; that said deafness was incurred while in the military service of the United States, and that, consequently, she is entitled under the law to the pension which she claims as his widow.

OPINION.

The testimony presented in support of appellant's declaration, relative to the incurrence by deceased soldier of the disability of deafness in the service and line of duty, is entirely unsupported by the records of the War Department, but, for the purposes of this claim, it may be accepted as sufficient to establish that point. The vital question presented by the claim, and upon which it is to be decided, is, was the death of the soldier caused by, or was it the direct result of, the disability incurred in his military service?

If the facts, as proved, should disclose that the soldier's death was directly and necessarily occasioned by his previously incurred disability in the service, it is evident that the title of his widow to pension would follow; but if, on the other hand, they show that the said disability was only incidentally connected therewith, and that the soldier had met his death from causes and circumstances to which his own negligence, carelessness, and lack of proper prudence had contributed, then it is equally apparent that his death could not be ascribed to the disability incurred in the service, in the sense to give title to pension.

The testimony on file, relating to the circumstances and manner of the soldier's death, is meager and unsatisfactory. There is enough,

however, to establish the following facts: The deceased had incurred deafness in his military service, which had gradually increased in severity, until, at the time of his death, it was difficult for him to hear. He was a skillful machinist, and, at the time of his death, was in the employ of a manufacturing firm in the town of Hamilton, Ohio, by whom he was sent to a neighboring village September 10, 1881, to repair some machinery. After finishing his work, he undertook to return home on foot after dark, walking upon the track of the Cincinnati, Richmond and Chicago Railway, and while so walking was struck by a fast express train and killed. It does not appear that there were eyewitnesses to the accident by which the deceased was killed; his remains were discovered by the train men and brought back to the village he had just left, upon the train which killed him. No one saw the engine strike him, and the theory (for it is nothing more) of the appellant, like the contention of her appeal, is that he was prevented by his aforesaid disability from hearing the approach of the train in time to avoid it; that his death was caused by the disability incurred in and by reason of his military service. It further appears that the deceased was not in the employ of the railroad company upon whose track he was killed, and that he was there voluntarily, making use of said track as a public highway for purposes of his own convenience in returning home from work.

It is a fundamental principle of law, that, where a person voluntarily places himself in positions of peril or of hazard, he thereby takes upon himself all the risks so incurred, and is alone responsible for any injury that may result therefrom. This doctrine has been frequently applied by this Department in the determination of questions arising in claims precisely analagous to the one under consideration. The case of Pyle, Elizabeth T. (1 P. D., p. 27), is directly in point. In that case the soldier, who had incurred deafness in the service, was an employé of the railway company, and engaged in building a bridge for said company at the time he was killed by a passing train, and pension was claimed on the same ground that is herein set forth. But the Department held that his death was the result of his own contributory negligence in not exercising that care and prudence which should have characterized one aware that he suffered from the disability of deafness; that said disability could not be considered as the direct or the proximate cause of his death, and the claim for pension was denied. Again, in the case of Mensing, Henry (1 P. D., p. 336), the Department held that, to establish claim for increase of pension for secondary or contributory cause of disability, it was incumbent upon claimant "to clearly prove, by competent and satisfactory evidence, that the accident resulting in the injury relied upon as the basis of his claim was directly occasioned by his previously incurred disability, and was not the result of any negligence, carelessness, or risk incurred on his part, or of a neglect of that due

care and caution which ordinary prudence would dictate should be exercised by one in his disabled condition."

In the recent case of Bennett, Thomas S., decided by the Department January 20, 1888, precisely analagous in principle with the one under consideration, the Department uses the following language:

A man afflicted with total deafness is guilty of gross negligence, if found walking upon a railroad track when not compelled so to do; and the injury incurred thereby could not, under any circumstances, be ascribed to the disability received in the service in such manner as to entitle him to a pension therefor.

The above cited decisions clearly and plainly define the position held by the Department with reference to this and all similar cases, viz, that the injury or death will be held to be the result of the careless and negligent conduct of the party himself, and as too remote from the disability incurred in the service to give title to pension.

A very slight consideration and analysis of the testimony on file in this claim, giving the circumstances of the soldier's death, meager and unsatisfactory as it is, will demonstrate the soundness of the above cited decisions of the Department and the utter fallacy of the reasoning of the appellant.

The soldier was returning, after dark, from his work in the village of Collinsville, and walking along the railroad track in the direction of his home in Hamilton, Ohio, when he was killed by the train. Under these circumstances, would it not be as reasonable to presume that the soldier did see the train, and was by some unknown cause prevented from avoiding it; or that he miscalculated the distance between himself and the train—delayed too long leaving the track, and, in attempting so to do, slipped and fell, or that any number of other things might have happened to cause the accident—as to accept what is so strenuously insisted upon by the attorney of appellant, viz, that, because the deceased had incurred the disability of deafness in the service, therefore said disability necessarily caused his death, or prevented his avoiding the accident?

The contention of the appeal rests wholly upon presumption and conjecture; but upon said grounds it is obvious no valid claim for pension can be based. There is, however, no room for conjecture, as the facts proved unquestionably establish that the proximate cause of the accident was the careless and foolhardy act of the soldier in walking upon the railroad track in the night-time, with full knowledge of his disabled condition, and that his death was the result of his own gross negligence, and not of the disability incurred in the service.

For the reasons above given, your action rejecting this claim upon the grounds stated by you is affirmed, and the appeal dismissed.

RE-RATING—ACT OF JUNE 18, 1874.

EDWARD POSSON.

1. The Department holds that, applying certain fundamental rules of construction, the words "total and permanent helplessness," used in the act of June 18, 1874, should be taken to mean such *incapacity for self-help* as would prevent the person in that condition from exercising any of the ordinary and necessary functions of daily life, such as walking, sitting, rising, dressing, eating, etc.; and this condition should exist without material change or alteration. This condition is defined by Congress as "requiring the regular aid and attendance of another person."
2. The settled practice of the Department is, to be guided in the determination of this and all questions purely medical by the opinions of its medical advisers and to accept as generally conclusive the opinions of the medical referee when based upon the results of medical examinations.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 3, 1888.

Herewith are returned the papers which accompanied your report of January 13, 1888, upon the appeal of Edward Posson, late a private, Company L, Second New York Heavy Artillery, from your action rejecting his claim for re-rating.

Claimant enlisted January 16, 1864, and was discharged from the service July 6, 1865. He filed his original declaration November 28, 1865, alleging as the basis of his claim a shell wound of right ankle, received in action, which refused to heal and resulted in a running sore. He was pensioned for said alleged disability and resulting epileptic fits, from July 6, 1865, at $8 per month; increased to $15 per month from June 6, 1866; increased to $18 per month from June 4, 1872; increased to $24 per month from October 3, 1876; increased to $30 per month from March 3, 1883, and to $50 per month from October 5, 1883—the rate he is now receiving.

Claimant filed the present declaration June 11, 1885, alleging that his condition has been continuously the same since the date of the amputation of his leg, December 10, 1877; that the disability from the cause for which he is pensioned was as great at the time as it was when the $50 rate was allowed, and claiming a re-rating to increase his pension to $50 per month from said date.

Claimant was medically examined September 4, 1873, by a board of surgeons at Auburn, N. Y., who, in their certificate of said examination, rated his disability at total third grade. He was next examined March 3, 1875, by the same board, who state in their certificate that his disability for manual labor was equal to the loss of both arms or both legs, requiring constant assistance of another person to take care of him, and rate his disability at total first grade, or $31.25 per month.

December 20, 1875, claimant was again examined by a single surgeon at Auburn, N. Y., who certifies:

The impairment of his mental faculties is plainly apparent. He is unable to do any labor and the convulsions recur as often as every two weeks, and continue from two to five days, often three, four, or five days. He requires the attendance of another person and his disability is total first grade.

September 4, 1877, he was examined at Red Creek, N. Y., by a single surgeon, who certifies: "He is worse for the past year than for the average of years past. He has them (epileptic convulsions) now slightly in groups of several a day or every day or two, and severely as often as every six weeks," and rates his disability at total second grade.

October 5, 1883, he was examined at Cleveland, Ohio, by single surgeon, who certifies: "His condition, mental and physical, is such as to require the constant aid and attendance of another person," and he rates his disability at total first grade.

August 12, 1885, he was examined by board of surgeons at Painesville, Ohio, who rate his disability from epilepsy at second grade; and from loss of right foot, third grade.

May 25, 1887, he was examined by board of surgeons at Columbus, Ohio, who state in their certificate: "General intelligence and condition of mind denotes a condition of imbecility. * * * It is our opinion that he requires the constant aid and attendance of another person," and they rate him total first grade.

Pending the adjudication of this claim, it has several times been referred to the medical referee for his opinion upon the medical questions involved. After careful consideration of the certificates of the various medical examinations of claimant, in connection with the medical evidence filed by claimant from time to time, in support of his claim, that officer stated his views in the following opinions. February 26, 1886, he says:

There does not appear any reason why a rerating should be allowed in this case. The evidence (of condition) prior to date of allowance of increase to $50 does not show utter helplessness, or so nearly so that the pensioner required the regular personal aid and attendance of another person. It is true the family were in the habit of sending some one with him when he left home, as a precautionary measure; but the evidence and the certificates of examining surgeons do not show that he could not dress and undress, feed himself, and wait on himself. Of late years his mind has become so seriously impaired that his helplessness has become much greater; hence the increase was allowed.

In an opinion dated June 10, 1886, the medical referee states:

Medically considered, the affidavits recently filed do not show the claimant to have been in such condition as to require the regular aid and attendance of another person prior to October 5, 1883."

Again, in an opinion dated December 29, 1887, the medical referee further stated:

From a medical standpoint, the case stands about in this way: During the period in which this man has suffered from epilepsy he has, during the attacks, required the personal aid and attention of another person; but, for such a degree of disability, he

was not entitled to first-grade rate during any part of said time, unless such attendance was permanently required; or, in other words, he was not entitled to first grade, if he required personal aid and attendance only at intervals during the separate attacks. When this attendance became continuous, we do not know precisely; but it is evident that the medical evidence last filed in support of the claim for first grade prior to June 16, 1880, is not sufficiently definite in respect to continuous attendance to controvert the other facts known from medical examinations, or, unless considered by itself and given the utmost latitude of interpretation, to warrant the belief that pensioner did at all times require personal aid and attendance after December 10, 1877.

Based upon these opinions and the recommendation of the medical referee, the claim for rerating was rejected August 23, 1887, upon the ground that claimant's pension had been properly and adequately rated from discharge, and the evidence did not show him entitled to the fifty-dollar rate prior to October 5, 1883.

From this action of rejection the claimant appealed October 27, 1887, contending that he is entitled to the fifty-dollar rate from the date of amputation of leg, December 10, 1887, up to October 5, 1883, and that the evidence filed so shows.

OPINION.

The appellant has been in receipt of a pension of $50 per month since October 5, 1883, his disability from shell wound of right ankle, which had resulted in amputation of the limb and epileptic fits, having increased to such an extent as at that date to render his condition one of utter helplessness, or so nearly so as to require the regular and constant personal aid and attendance of another person. He now seeks a re-rating, claiming that his condition has been such since December 10, 1877 (the date of the amputation of his leg) as to entitle him from that date to the rate he is now receiving.

The proper signification to be given to the words, "total and permanent helplessness, requiring the regular aid and attendance of another person," must be derived from a construction of the act of Congress approved June 18, 1874, in which they are used, and by which the pension of $50 per month, is provided. This is a legal question, and should be decided in accordance with the usual and well-known canons of construction applied by all judicial tribunals in construing statutory provisions.

The statute must be construed as a whole, so as to conform to and express the meaning and intent of the legislative body by which it was enacted, and to make it operative for the purposes for which it was intended. If it is sufficiently plain in its provisions, then there is nothing to construe, and all that is required is to execute it. The usual and ordinary meaning of words and phrases is to be given to them; nor is the language of the statute to be distorted or the construction of its sentences changed, unless it is apparent that it is necessary so to do in *order to* carry out the intent and purpose of the legislature, and to at-

tain the object sought by the enactment of the law. Applying these fundamental rules to the statute under consideration, it is apparent that the words "total and permanent helplessness," used therein, should be taken in their usual and customary signification to mean such an incapacity for self help as would prevent the person in that condition from exercising any of the ordinary and necessary functions of daily life, such as walking, sitting, rising, dressing, eating, etc., and that this condition should exist without material change or alteration. Congress, however, has not left the phrase "total and permanent helplessness" to stand alone, subject to a general and broad construction, such as has been given above, but has defined and limited it to "total and permanent helplessness, requiring the regular aid and attendance of another person." The disability, then, which will give title to the pension provided in this act must be of such a character as to result in such incapacity to perform the ordinary functions of life as necessitates the regular care, attention, and assistance of another person.

Must this "regular aid and attendance," as above defined, be continuous or occasional, complete or partial, in character?

It is evident that, if the "aid and attendance" were but occasional (although recurring at regular intervals) in character and partial in nature, the degree of helplessness requiring it would not be total, within the meaning of that term, as above given; so that, by a construction of said statute, following ordinary rules and giving to the words their obvious and usual signification, the "regular aid and attendance" required must be continuous and complete.

In view, however, of the well-known policy of the Department that pension laws will be construed in a spirit of liberality towards the claimant for pension, it is not deemed best to carry to the extent above indicated the construction which might legitimately be put upon the language of the statute. The Department is of the opinion that the more reasonable rule, and the one most clearly expressing the full intent and meaning of Congress in said act, is that, in order to give title to pension of $50 under said act, there shall be shown to exist a disability resulting in such "total and permanent helplessness" as necessitates the aid and attendance of another person in the exercise of a large part, at least, of the ordinary functions of life, and that said "aid and attendance" must be continuous, in the sense that it must be at all times at the command and within call of the person so disabled.

The question as to whether the extent and severity of the appellant's disability during the period from December 10, 1877, to October 5, 1883, for which, as he claims, he should be re-rated at $50, has been such as to bring it within the rule just laid down, is a purely medical one, to be determined by the medical evidence on file and by the opinions of medical experts, based upon the results of examinations exhibiting appellant's physical condition.

The medical evidence is full and explicit. It shows that the epilepsy resulting from his wound, both prior and subsequent to the amputation of his leg, appeared in two forms, slight attacks almost daily, and severe fits or convulsions at irregular intervals of from two days to six weeks. When attacked with a severe convulsion he has required the aid or care of another person for a few hours or for a week at a time; but after recovering from the effects of such fits he could care for himself until again attacked. This appears to have been his condition during the period for which he claims re-rating and up to some time in 1883; but, as the attacks occurred at irregular intervals, and were liable to appear at any time, his friends deemed it necessary to keep a constant watch over him. Just at what precise point of time appellant's disability had so far progressed that he could be said to have become so "permanently and totally disabled as to require the regular personal aid and attendance of another person," within the meaning of those terms as herein defined, appears to be not easy of determination, nor free from doubt.

All the medical evidence presented in support of the claim, together with the certificates of the numerous medical examinations which appellant had undergone, giving his physical condition from time to time during the period for which he claims a re-rating, were repeatedly submitted to the medical referee, with a view to determining, if possible from a medical point of view, when his disability did become such as to render him "totally and permanently helpless" within the meaning of the statute.

It will readily be seen, from a perusal of his opinions (quoted at length in the statement of facts herto attached) as rendered from time to time during the adjudication of this claim, that he holds that the evidence is not sufficient to medically establish the required degree of disability within the period for which re-rating is asked, to entitle the appellant thereto; and the referee contends that claimant has been adequately and liberally rated from discharge for his disability as shown to exist from time to time.

It is the settled practice of the Department to be guided in the determination of questions purely medical by the opinions of its medical advisers, and to accept as generally conclusive the opinions of the medical referee when based upon the results of medical examinations. (See cases of Gaskill, Lucinda, Vol. I P. D., p. 29; Presten, Patrick, *Id.*, p. 41; Douglass, John, *Id.*, p. 52; Garrison, William H. *Id.*, p. 262; Foulkner, Joseph F., *Id.*, p. 292; Romine, Uriah W., *Id.*, p. 299); and in view of the foregoing reasons, in conjunction with the well-established rule of the Department, as shown in the decisions aboved cited, the holding of the medical referee in this claim will not be disturbed.

Your action rejecting this claim is accordingly affirmed, and the appeal dismissed.

LINE OF DUTY.—UNDERGOING PENALTY.

CLARENCE WALLACE.

Where a soldier was arraigned, tried, and convicted by a court-martial for an offense against the regulations of the Army, and, during the execution of the sentence, whilst in confinement, he contracted typhoid fever and resulting deafness: *Held*, That the resulting disabilities were not incurred in the line of duty. Claimant can not be pensioned for disabilities incurred whilst undergoing a penalty inflicted by reason of his own wrong.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 9, 1888.

I herewith return to you the papers which accompanied your report on the appeal of Clarence Wallace, Company H, Nineteenth United States Infantry, from the adverse decision of your office in his claim for invalid pension No. 617154.

The basis of this claim, which was filed July 20, 1887, is typhoid fever and resulting deafness, alleged to have been contracted by claimant whilst in the line of duty at or near Fort Smith, Ark., about September 11, 1868.

Claimant enlisted November 29, 1867, and was discharged from the service July 20, 1869.

The service of claimant, as alleged, and the fact that whilst in the service he contracted typhoid fever which caused partial deafness, are admitted; but the claim for pension was rejected upon the ground that claimant's disability did not originate in the line of duty, and is, therefore, not pensionable.

From this adverse decision the present appeal is taken.

OPINION.

The claimant's enlistment and service being admitted, and the incurrence of the alleged disability in the service being also admitted, the only question to be determined upon this appeal is whether or not the said disability had its origin in and was due to the line of duty? In order to settle the question it is necessary to ascertain the situation of claimant at the time when he contracted the alleged typhoid fever which, as he says, caused the partial deafness upon which his claim is based. Reviewing the accompanying papers, I find that the certificate of disability upon which claimant was discharged from the service is sufficiently explicit on this point. That certificate is in the following terms:

* * * During the last two months said soldier (the claimant) has been unfit to perform his duties for two months because of deafness caused by typhoid fever contracted at Fort Smith, Ark., in the month of November, 1868, at which time the soldier was in confinement undergoing sentence of a general court-martial.

Station: Fort Smith, Ark.

Date: January 22, 1869.

MARK WALKER,
First Lieut. Nineteenth Infantry,
Bvt. Capt. U. S. A., Commanding Company.

I certify that I have carefully examined the said Clarence Wallace, of Capt. William R. Lowe's company, and find him incapable of performing the duties of a soldier because of deafness resulting from typhoid fever. Disability one fourth.

J. MORRIS BROWN,
Bvt. Maj. and Asst. Surgeon.

Discharged this 24th day of February, 1869, at Fort Smith, Ark.

PINKNEY LUGENBEEL,
Lieut. Col. Nineteenth U. S. Infantry,
Commanding the Reg't.

It appears from the foregoing certificate of disability, which in the adjudication of this case must be accepted as an indisputable and conclusive record, that the disability for which claimant asks to be pensioned had its origin whilst he was in confinement undergoing the sentence of a court-martial. This fact is sufficient in itself to locate the incurrence of the alleged disability outside the line of duty in the service. Claimant had been evidently guilty of an offense against the regulations of the Army, on which account he had been arraigned, tried, and convicted by a court-martial, and, during the execution of the sentence, and whilst in confinement, he had contracted typhoid fever. It is presumable that, if claimant had not been guilty of the aforesaid offense and sentenced therefor to confinement, he would have escaped the disease to which he ascribes his disability; but it would be neither justice nor good policy now to grant claimant a pension for a disability that was due to his own violation of the line of duty in the service. Cases involving the doctrine thus indicated have been already carefully adjudicated by the Department, and the rulings therein are worthy to be maintained. For instance, in the case of Joseph Reed (minors of), application No. 222169, Secretary Chandler decided, January 6, 1877, that—

Where soldier's disability was contracted while confined in a military prison on a charge of desertion: *Held*, That he was not in line of duty, as the imprisonment was in consequence of his violation of the law.

In the case of Michael Kearns, application No. 173284, Secretary Schurz, December 5, 1879, decided that—

A soldier is not in the line of duty as construed by the administration of the pension law when absent from his company under sentence of a provost court.

It was decided by Secretary Teller, in the case of Sarah J. Barber, No. 213778, September 29, 1882, that—

A soldier who dies of disease contracted while undergoing imprisonment in consequence of having violated military law can not be regarded as having died of disease contracted in the line of duty, and his widow is not entitled to a pension.

The principles upon which the foregoing rulings of the Department rest are clearly applicable to the claim now under consideration. Claimant can not be granted a pension for disabilities incurred by reason of his own wrong. He was not in the line of duty whilst undergoing the *sentence of a court-martial*, and, therefore, can not be lawfully pensioned *for a disability contracted* by him whilst in that situation. I therefore *approve the rejection* of the claim and dismiss this appeal.

MISTAKEN CAUSE OF DISABILITY.

WILLIAM H. SCOTT.

Where claimant alleges one disease as the cause of his disability, but the result of careful medical examinations shows an entirely different cause, the reports of said medical examinations will be accepted as correct, and the claim for pension will be adjudicated in accordance with the facts thus ascertained by the medical advisers of the Department, the claimant's allegation being construed as a mistake.

Assistant Secretary Hawkins to the Commissioner of Pensions, March 8, 1888.

Herewith are returned the papers which accompanied your report of February 25, 1888, upon the appeal of William H. Scott, Company C, Ninety-seventh Ohio Volunteers, from your action rejecting his claim for invalid pension, No. 190,097.

The Adjutant-General, U. S. Army, reports claimant enlisted September 1, 1862; absent, sick, at Gallatin, Tenn., since December 8, 1862.

Discharged, March 21, 1863.

The certificate of disability upon which appellant was discharged from the service is signed by Dr. S. M. Hamilton, medical director, and reads: "because of valvular disease of the heart." "Not entitled to a pension."

Declaration, filed February 18, 1874, alleges sun-stroke in camp at Zanesville, Ohio, September, 1862, causing fits, which have continued ever since.

There have been two medical examinations in this case, the first by Dr. Daniel Rusk, at Malta, Ohio, July 21, 1875, who reported:

Height, 5 feet 8 inches; weight, 130; age, 32; pulse, 90; respiration, 20. A full compressible pulse. Respiration a little labored. Eyes slightly engorged. Tongue coated. Swimming of the head. Rate total.

The report of examination by medical board, Zanesville, Ohio, February 7, 1877, was as follows:

The board is satisfied from written and verbal evidence presented this day that William H. Scott now has epilepsy, the result of sun-stroke contracted in line of duty while on drill at Camp Zanesville. From the evidence before us, these attacks of true epilepsy now occur about once a week, and unfit him for manual labor unless in the presence of friends knowing his condition and ready to render assistance. Rate total.

The claim was rejected July 12, 1878, upon the ground that the alleged disability originated prior to enlistment.

From this action an appeal was filed November 3, 1886, in which appellant contends that his claim was examined by a special agent under the old regulations, that whatever adverse testimony was taken was without his knowledge, and no competent person was present to represent him.

Upon consideration of said appeal by this Department, the papers in the claim were returned to you on August 20, 1887, with the request that you cause "the same to be specially examined in accordance with

the present rules and regulations of your office, with a view to ascertain definitely, if possible, the physical condition of appellant prior to enlistment, the continuance of his alleged disability since discharge, and also that he may have such a medical examination by a competent board of surgeons that his present physical condition may be known."

In accordance with said departmental direction, the claim was subjected to a thorough and searching special examination in the field, upon the points indicated, every opportunity being afforded claimant to be present and to be represented during said examination. Claimant was also again medically examined by the board of surgeons at Red Oak, Iowa, who certify a thorough description of his present physical condition, and state that they fail to discover any symptom of the alleged disability, the result of sun-stroke, and find and rate him one-half total for disease of heart, three-fourths total for disease of eyes, and one-fourth total for disease of lungs.

The evidence procured upon said special examination, together with the certificates of the several medical examinations of claimant, and all the evidence previously filed in the claim was, on January 31, 1888, referred by you to the medical referee of your Bureau for his consideration and opinion as to "whether, in view of the information contained in the record and testimony on file, said adverse action, so far as the point of pathology is concerned, was correct from a medical standpoint."

In response to said reference, that officer states, after having given the claim most careful attention and consideration, in opinion dated February 3, 1888:

> We fail to discover anything in the testimony, or in the certificates of examination on file, that can not be accounted for by the disease of heart, of record, and which still exists as shown by former and recent examinations. The claimant probably fell from syncope while in the service as alleged, but mistook the cause of his disability.

The claim was again brought by you to the attention of the medical referee, February 8, 1888, for his "opinion as to whether in view of the evidence on file, the appellant is entitled to a rating to cover any period since discharge, by reason of the results of sun-stroke, independent of the heart affection shown by the record," and, in opinion of February 11, 1888, he replies:

> As indicated in my opinion of the 3d instant, there has been no disability from results of sun-stroke independent of the disease of heart, of record, and with which he is still suffering.

In accordance with the aforesaid views and recommendation of the medical referee, you state in your report upon this appeal that you adhere to your former action of rejection, and return the papers to this Department for final action upon said appeal.

OPINION.

This claim has received most careful consideration and investigation *by your Bureau, and* by the Department.

Appellant alleges, as the basis of his claim for pension, attacks of insensibility or "fits," which, he alleges, are the result of sun-stroke incurred in the service.

It appears from the record that he was discharged from the service upon a certificate of disability on account of "valvular disease of the heart" which existed prior to enlistment. When the papers in the claim were formerly before the Department on this appeal, the evidence and the certificates of the medical examinations, then on file, were not deemed satisfactory, or sufficient to warrant the action of rejection, said evidence being exclusively directed to establishing the freedom of appellant prior to his enlistment from the disability alleged in his declaration for pension, the incurrence of the alleged attack of insensibility at Camp Zanesville, Ohio, in 1862, and the continuance of said attacks or "fits" since his discharge—the existence of the disease of heart, for which he was discharged, being apparently ignored both in the testimony of witnesses and in the medical examinations of appellant.

The papers were accordingly returned to you, for the purpose of having the claim more thoroughly specially examined, to ascertain from what cause the disability of appellant resulted, and, at the same time, that he might be subjected to a careful medical examination which would disclose with some degree of accuracy his present physical condition and symptoms.

The appellant having been discharged for "valvular disease of heart," for which, as shown by the certificate of disability, he was not entitled to pension, and having made no claim for pension for said disability, it became necessary to determine (provided said disease of heart was shown to exist), whether any, or what part of his disability was due to that disease, and what could be ascribed to the alleged sun-stroke upon which his claim for pension rests.

This being purely and exclusively a medical question, the testimony obtained and the certificate of the medical examination made in pursuance of said departmental direction were laid by you before the medical referee for his opinion upon the aforesaid question. That officer, after having made careful investigation of said evidence, held in two opinions, which are quoted at length in the foregoing statement of facts, in substance: that the appellant had mistaken the cause of his disability, and that both the supposed sun-stroke and the subsequent disability as shown must be ascribed to the disease of heart, of record, and can be medically accounted for on no other basis. He furthermore holds that there has been no pensionable disability from the results of sun-stroke, independent of said disease of heart from which appellant is at present a sufferer.

It is the settled practice of the Department to be guided in the determination of questions purely medical by the opinions of its medical advisers, *and to accept as* generally conclusive the opinions of the medical referee *when based upon* the results of medical examinations. (See

cases of Gaskill, Lucinda, vol. 1, P. D., p. 29; Presten, Patrick, *id.*, p. 41; Douglass, John, *id.*, p. 52; Garrison, William H., *id.*, p. 262; Foulkner, Joseph F., *id.*, p. 292; Romine, Uriah W., *id.*, p. 299.)

This well-established rule of the Department, as held in the decisions above cited, applies directly to the claim under consideration, and will be adhered to in the absence of evidence indicating error or mistake in arriving at a conclusion on the part of the medical officers.

Your action rejecting this claim upon the grounds stated by you is accordingly affirmed.

SPECIAL AND GENERAL LAWS—PENSION IN LIEU.

PETER ADAMS (UNDER SPECIAL ACT OF CONGRESS).

1. When a claimant seeks relief at the hands of Congress, he thereby virtually agrees to abide by the action of that body in determining the merits of his claim for pension; and he agrees, furthermore, that, in case he be granted a pension, the payment of the same shall begin at the date of the passage and approval of the special act, unless the act itself specifically designates some other date; and, in the absence of such designation, claimant will not only have no right to arrears, but be cut off from all claim to arrears, or to any additional sum of money of whatever character, other than or in addition to that expressly provided for in such special act. (Alvin Walker, vol. 1, P. D., p. 143.)
2. If a claim for pension, having been granted by special act, "be reconsidered by the Commissioner, justice to the Government would require that it be done *ab initio*, in total disregard of the special act" granting the pension, and "in absolute freedom from any condition or promise."

Assistant Secretary Hawkins to the Commissioner of Pensions, March 19, 1888.

Herewith are returned the papers which accompanied the appeal of Peter Adams, late of Company D, One hundred and fifty-sixth Pennsylvania Regiment of Volunteers, from the action of your office adverse to his pension claim, certificate No. 335985.

The claimant in this appeal is receiving a pension at $4 per month for injury of left testicle, said pension having been granted by reason of a special act of Congress, approved August 4, 1886, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension roll, subject to the provisions and limitations of the pension laws, the name of Peter Adams, late of Company D, One hundred and fifty-sixth Regiment, Pennsylvania Volunteers.

Approved, August 4, 1886.

Claimant, having applied to Congress and having received a pension at $4 per month by reason of the foregoing special act of Congress, filed a claim with the Commissioner of Pensions, whereby he sought to surrender the certificate that had been issued to him under the special act, and to re-assert his claim under the general law. Claimant also raised in this claim the question as to "the pensioner's right to again re-

ceive his certificate under the special act in the event of failure under the general law."

Your office rejected this claim, and it comes here on appeal from that action.

OPINION.

The claimant in this appeal, having been pensioned at the rate of $4 per month by reason of the special act of Congress passed for his benefit and approved August 4, 1886, now asks that he be allowed to surrender his pension certificate under said special act and to re-assert his claim under the general law. Claimant furthermore insists that, in the event of failure to procure pension under the general law, he be allowed to resume possession of the certificate that was granted him by reason of the aforesaid special act.

It is apparent from the peculiar character of the claim which forms the basis of this appeal that claimant intends, in the first place, either to gain a pecuniary advantage under the general law by surrendering his certificate for pension under the aforesaid special act and, in lieu thereof, filing his claim under the general law; or, secondly, that he shall lose nothing in the event that, by reason of such surrender, he fails to procure a more desirable rating under the general law, inasmuch as he proposes, in that event, to have the certificate that had been granted under the special act restored to him. The first part of claimant's proposition is predicated upon the old ruling or custom of the Department whereby a pensioner under a special act might elect to take, in lieu thereof, under the general law. But that ruling or custom was abandoned some time ago, as being inconsistent with section 4715 of the Revised Statutes, and also with section 5 of the act of July 25, 1882, the latter of which provides that "no person who is now receiving or shall hereafter receive a pension under a special act shall be entitled to receive in addition thereto a pension under the general law, unless the special act expressly states that the pension granted thereby is in addition to the pension which said person is entitled to receive under the general law." The right of any pensioner to take one certificate in lieu of another, as provided in section 4715, had reference to pensioners under the general law only, and not to the exchange of a pension under a special act for a pension under the general law, in the expectation of pecuniary gain. The discrimination is a plain one between a special act and the general law. It is true that the foregoing section 5 of act of July 25, 1882, was clearly designed to prohibit the granting of two pensions for the same cause and to the same person, unless the additional pension be expressly provided for in the special act; but it was designed, also, to restrict or to forbid any practice, or custom, or ruling of the Department whereby a claimant might so shift his claim between a special act of Congress and the general law as to *secure for the same disability* a pecuniary advantage in the form of an *additional rating of pension* not expressly provided for in the special

act. With this view of the law, the Department held in the case of Alvin Walker (vol. 1, P. D., p. 143) that—

When a claimant seeks relief at the hands of Congress, he thereby virtually agrees to abide by the action of that body in determining the merits of his claim for pension, and he agrees, furthermore, that, in case he be granted a pension, the payment of the same shall begin at the date of the passage and approval of the special act, unless the act itself specifically designate some other date; and, in the absence of such designation, claimant will not only have no right to arrears, but be cut off from all claim to arrears or to any other additional sum of money of whatever character other than, or in addition to, that expressly provided for in such special act.

The grounds upon which the aforesaid section of the act, approved July 25, 1882, is based were well stated, in part at least, in the following paragraph, quoted from the departmental decision rendered February 6, 1886, in the case of Edwin R. Tucker (vol. 1, P. D., p. 1) to wit:

The genius of our institutions and the policy of our laws is to limit, so far as it can be conveniently done, all discretion on the part of executive officers in drawing money from the public treasury; and, when the law-making power has by a special act granted a pension to a particular person, the presumption is that the act measures the full bounty intended to be conferred on that person by way of pension, and that no additional amount whatever should be granted under the general law, unless expressly provided for under and by the special act.

The limitations thus applied by the Department to the old practice of substitution, whereby a pension under the general law might be taken in lieu of that which had been granted under a special act, are the result of proper considerations of good policy and of justice, as between the pensioner and the Government alike. They serve, also, to restrain just such propositions for bargain as that which is contained in the pending claim and which is evidently based by claimant upon the probable advantages to himself of the general law over the provisions of a special act of Congress. This identical point was strongly and accurately presented in the decision rendered by the Department, April 29, 1887, in the case of Alvin Walker (P. D., vol. 1, p. 143), wherein, discussing the peculiar issue that had been raised by Walker, it was said:

But the claimant in this appeal, after having had his claim granted by a special act of Congress, comes now with a request that it be re-opened for reconsideration by the Commissioner of Pensions, and offers through his attorney to accept a pension to be granted by the Commissioner from the date of his discharge, May 29, 1865, in lieu of that granted by special act of Congress, August 5, 1882. The claimant, it is presumable, makes this offer upon the condition that, if the Commissioner re-open his claim, he will certainly grant his prayer upon the evidence contained in the accompanying papers. But no such certainty can be guarantied claimant. If the claim be reconsidered by the Commissioner, justice to the Government would require that it be done *ab initio*, in total disregard of the special act of August 5, 1882, granting a pension, and in absolute freedom from any condition or promise. It is apparent, however, that the proposed exchange of pensions is prompted by the expectation, on claimant's part, that in the process of substituting one pension for another he will get the better bargain to the extent of an "additional sum of money" other than, or in addition to, that expressly provided for in the afore-mentioned special act.

But, in addition to the foregoing, the claimant in this appeal asks *that he shall be allowed* not only to take a chance at procuring a more

advantageous rating from a reconsideration of his claim by the Commissioner of Pensions under the general law, but that, in the event of failure, he shall be allowed also to resume possession of his present certificate and continue to enjoy the proceeds of his pension under the special act which was passed for his benefit, August 4, 1886. This request is an extraordinary one. It is not only in violation of section 4715 of the Revised Statutes and of the act approved July 25, 1882, but inconsistent with every principle of fair dealing. It is a "dicker" for an additional rating. It is the exaction of a "promise" in the nature of a bargain, which the Department has no authority to make; and, were the promise granted, it would lead the way to the grossest injustice to numerous pensioners who are no less worthy than claimant. The Department, therefore, recognizing the pernicious character of claimant's proposition, refers him to the legislative branch of the Government as the only authority that is competent to grant for his present disability the "additional sum of money" which he evidently seeks through a perversion of both the letter and the spirit of the pension system.

In view of the foregoing considerations, the rejection of this claim is affirmed.

DEATH CAUSE: CORRECTION OF RECORD.

DELILA, WIDOW OF HENRY HENNICK.

The War Department corrected the entry of "death from delirium tremens," upon the evidence presented; but the fuller testimony, brought out by several special examinations, renders it more probable that claimant's death was due to delirium tremens than to any cause relied upon by the claimant; and delirium tremens is accepted as the cause of soldier's death.

Secretary Hawkins to the Commissioner of Pensions, March 2, 1888.

Herewith are returned the papers *in re* No. 39026, of Delila Hennick, widow of Henry Hennick, Company F, Second Ohio Heavy Artillery.

Soldier was enrolled August 7, 1863, and died in regimental hospital at Covington Barracks, Ky., September 12, 1863, of "delirium tremens."

The widow filed her original declaration for pension, November 20, 1863, alleging that the soldier died in service, September 12, 1863. She filed another declaration, August 2, 1876; yet, in neither of these declarations did she state the cause of the soldier's death. In another declaration, filed December 7, 1877, she, however, alleged that his death was due to "chronic diarrhea."

The case was rejected October 14, 1884, on the ground that soldier's alleged death-cause in line of duty not accepted.

From such action the appeal is taken.

(W. C. Langhan for appellant.)

OPINION.

A very patient hearing has been given to all the evidence filed in this case. The Department thereupon adopts so much of the able and exhaustive opinion of Mr. Hickox, of the Pension Office, as is contained in the following extract and deemed pertinent to the merits of the claim:

On the 7th of August, 1863, a recruit was enrolled at Lancaster, Ohio. We know nothing whatever of him, by heresay, rumor, letter, allegation, testimony, nor record, till he reached Covington, Ky. How long he staid in Ohio after the enrollment, where he went, and what he did, and in what condition, under what circumstances, or at what time he started for Covington, or got there, we do not know. All we know of his movements and conduct is that he reached Covington, went into the hospital of the regiment for which he was intended, died there immediately before muster-in, and that the regimental surgeon reported in a regular manner, at the time, that he died of delirium tremens. This was thirty-seven days after his enrollment at Lancaster.

The Adjutant-General calls him an unassigned man of Ohio volunteers. The captain tells us the little he knows of his history before the surgeon took him at Covington. I can not gather from any source that he performed any duty or incurred any exposure that should have killed him; and I infer that he joined the company at Covington, and did not go with the rest from Ohio. Of this I am not certain. We know that, whatever caused his death, it was something acute and not a presumable result of the performance of military duty. We know that it was not a chronic disease, chargeable to the service.

The cancellation of this record of death by the War Department need not affect our judgment, for that Department gives us all the evidence it has, states its reasoning, and lets us see for ourselves the value of both. Had the whole case been spread before the Adjutant-General, as it is before us, would he have talked about cancelling the record? I think not. It would not matter if he did. I even think that if the whole case were properly presented to him now, he would cancel his cancellation.

The surgeon who made this record writes like a reasonable and honest man. He gives nothing that should raise a doubt of the correctness of the record. He admits only what we knew before, and what all candid men will admit. A mistaken diagnosis is a possibility, or we could not further consider the case. He gives no new fact that indicates that he did make a mistake: "He certainly had delirium when I saw him, or I should not have so stated." He says that. The medical referee admits that. The cause of the delirium is all that concerns us. Tested by the recollection of its author, the record is not destroyed. He does not give us a new fact that weakens it. He does not give us any reasoning that would not occur to any mind without his giving it. He does not give us any reasoning that would not occur to his own mind when he made the record.

The death occurred in September, 1863. In January, 1865, when the regiment was in Tennessee, the surgeon gave another certificate of death, and repeated exactly what he said before—delirium tremens. This shows, at least, that during all this long interval in the service he had learned nothing to the contrary. If he had made a mistake he had not found it out.

About the same time, January, 1865, the captain certified on honor to the adjutant-general of Ohio that the soldier had died of delirium tremens. If a mistake had been made, the captain also had not found it out.

There has never been any question about the date or the place of death, nor about anything except the nature of the delirium with which he died. There was no question of this in service, as we see from the date of the above certificates. There is *not a line of evidence on* the subject, of any kind, or from any source whatever, *except what we have from* the captain and this surgeon.

When the claimant's first declaration was filed, soon after soldier's death, the blank used provided for a statement of cause of death, one of the two vital factors in a widow's case, and was prepared by an attorney who knew his business. But this foundation of the case was ignored, the space was left unfilled, and the declaration simply said that the soldier *died*. The third declaration simply said that he contracted disease, of which he died. She did not avoid naming or describing the *cause* of death in both these declarations, except for one of two reason—she did not know what it was, or else she knew it was not a *valid* one. In her second declaration, prepared by a new attorney, she did name a cause of death, and it was chronic diarrhea.

Since making the claim in 1863, except in this single instance, after twice ignoring it in declarations which could not have ignored it accidentally, she has never, by oath, letter, nor otherwise, made any allusion to the cause of death. Yet, for more than twenty years this point, and this alone, has kept her out of her money.

She has had four experienced attorneys before the present one—including Coffin—yet, they have all left the case as empty as they found it, excepting this single abortive attempt at *chronic diarrhea*. With this single exception, not one of them, by letter, evidence, protest, or in any way whatever has, even indirectly, let us see that she or any one else so much as *thought* that this record was wrong. For twenty years, during which four different attorneys took up the case and dropped it, not one word has been said to controvert it, or in allusion to it. In her latest power she tells us that one of her former attorneys lost her evidence, and that the executor of another one destroyed the rest of it. Being skillful and experienced men, perhaps they thought that to lose her evidence or to burn it up was the best way to help her case. They would be right in such a view if the one paper they did file to prove the *diarrhea* is a specimen of the rest.

The declaration alleging chronic diarrhea, received four years after the claim was filed, was accompanied by an affidavit written by the attorney who wrote the declaration, and which was signed by the captain, saying that soldier died of chronic diarrhea contracted in line of duty. As this captain had certified to the adjutant-general of Ohio, on honor, when in service, that soldier died of delirium tremens, we wrote to him. He replies: "The facts are such that I believe I have told the truth." As he does not say *when* he told it, we can only dismiss this assertion and judge from the context. He goes on: "I never saw Henry Hennick until he came to camp—was in the surgeon's hands before my company was mustered, and died in the hospital at Covington." "Disease given to me by the surgeon was as stated in his final statements." "It may have been chronic diarrhea—can't say—as all our company books were turned over," etc. (The "final statements" I have already quoted—the certificates of 1865, the captain's addressed to the adjutant-general of Ohio, and both his and the surgeon's saying delirium tremens.) "However, parties that knew the man said that he was a great whisky-drinker, and cutting off his supply of liquor in camp was the real cause of his sickness. I was annoyed by some attorneys with papers claiming a pension, and made out one or two sets for them that had to be changed. One of our surgeons, when I asked what was Hennick's disease, told me the real cause of his death was delirium tremens." "I have doubtless committed some errors—I endeavored to do my duty by both my men and the Government." Others may make what they can of this; what I make of it is what the rest of the case betrays. He was badgered into signing an affidavit as to chronic diarrhea, having given "one or two sets" which the attorney didn't want. And according to what he heard and believes—so far as he can give us any light and facts—the man was a whisky-drinker and died of delirium tremens. If he does anything, he stands by the statement he made to the adjutant-general in 1865.

Besides the three declarations noticed before, this woman made a fourth one, for increase. The omission of cause of death from this is not remarkable. But, all the same, it *should serve to show* us who and what and where she was. After three of

these declarations were in the case, in 1872, we sent a special agent, under the old system, to look into it. This is his report: "I made diligent inquiry for her, but was unable to get any information respecting her whereabouts since the early part of 1871." We know no more about her history now than we found out, or didn't find out, then.

So far I have not argued the case, but stated it. Nothing more ought to be necessary. But it comes to me in such a shape that a few words more may be said. The first step toward disproving the record should be by proving what did cause death, if *mani a potu* did not. This is so obvious that it could not be overlooked, and during twenty years, with four previous attorneys, it would have been *attempted*, if it could have been done. Excepting the diarrhea fiasco it has not been attempted, and of course not done. It is not now attempted. Not one condition that should precede the overthrow of the record has been fulfilled. But a Washington attorney, after twenty years of silence on the part of his local predecessors, gives the War Department half a dozen affidavits from people we know nothing about, which in no way touch the soldier's service and death, but say that before enlistment he was—not a teetotaler—but temperate, and one can kill himself with drink in thirty-seven days if he is so inclined.

As the Adjutant-General has knocked out of the case the only evidence of the cause of delirium that ever was in it, and as the medical reviewer, who has already passed upon the facts, finds the cause of the mania outside the evidence anyway, how would it do to call it hydrophobia? There is no mad dog in the case, but we can assume one.

That paragraph is not written to disparage the medical reviewer, whose reasoning is good, but to emphasize the unprofitableness of getting from him a conclusion before he gets a proper statement of his facts. It is likely to result in disrespect all round. I think the case should not, in its present condition, have left the rejected files.

It may be further remarked that, while several witnesses of good character testify, to the best of their knowledge, recollection and belief, that the decedent, prior to his enlistment, was a very temperate man, there are other witnesses, including the bar-keeper with whom he dealt, whose opportunities for knowing the facts were as good as any, who proved that he was not a total abstainer from intoxicating liquors, but that he was, at least occasionally, more or less, under the influence of such stimulants before enlistment. It may be granted that just previous to his death he had diarrhea or dysentery, but this does not improve the case, for the greater probability is that such disease was directly due to his use of intoxicants, and would not have occurred to him, but for the condition to which his system had already been reduced by this indulgence—whether in public or in private is immaterial.

So that the conclusion of this Department is that, while the War Department corrected the entry of death from delirium tremens upon the evidence before it at the time, the fuller testimony as brought out by the several special examinations shows a greater probability of death from this cause than from any relied upon by the claimant. Your rejection of the claim is, therefore, affirmed.

INSUFFICIENCY OF EVIDENCE.

WILLIAM WATERBURY.

Disabilities which are pensionable in degree, and which are specifically alleged as the basis of a claim, must be proved to have originated in the service and line of duty; and if, in the absence of such proof, it appear that a searching and careful investigation, extending over a number of years, has failed to establish the existence, at discharge, or the continuance thereafter, of said disabilities, the claim should stand rejected for insufficiency of evidence.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 23, 1888.

Herewith are returned the papers which accompanied your report of February 7, 1888, upon the appeal of William Waterbury, late private, Company C, Third Michigan Cavalry, from your action rejecting his claim for invalid pension, No. 260477.

Claimant enlisted October 9, 1861, and was discharged September 2, 1865. He filed his declaration for pension September 16, 1878, alleging, as the basis of his claim, that, about September 14, 1861, at Corinth, Miss., his horse fell upon him, causing double hernia, and that, at White River, Ark., May 10, 1865, he contracted chronic diarrhea.

The records of the War Department show claimant's enrollment as a member of Company M, said regiment, October 9, 1861, and report him on the rolls of said company from muster-in to February 28, 1863, present. Re-enlisted as a veteran volunteer, January 19, 1864, and transferred to Company C; was admitted to Lawson General Hospital, Saint Louis, April 10, 1864, with orchitis; Marine general hospital, Saint Louis, May 26, 1864, with gleet; General Hospital, New Orleans, La., May 17, 1865, with chronic diarrhea; General Hospital, Memphis, Tenn., June 9, 1865, with chronic diarrhea; and General Hospital, Detroit, Mich., July 21, 1865, with same disease. The records furnish no evidence of *rupture* as alleged.

The Surgeon-General reports that claimant entered hospital April 10, 1864, with orchitis; entered hospital Saint Louis, May 26, 1864, with gleet, and several hospitals in 1865, with diarrhea.

Claimant was medically examined by the board of surgeons at Dayton, Ohio, January 15, 1879, who rate him three-fourths total for disability resulting from double rupture, and nothing for chronic diarrhea, of which they fail to find any signs.

By the same board, August 3, 1881, he is rated three-fourths total for double hernia; but the board certify no rating and no symptoms of chronic diarrhea.

The board of surgeons at Cleveland, Ohio, November 5, 1884, rate him total for hernia, and certify: "No disability from diarrhea;" no rate.

The board of surgeons at same place, October 14, 1885, rate him twelve-eighteenths for "disability caused by double inguinal oblique hernia; one-half for that caused by chronic diarrhea; one-quarter for that caused by hemorrhoids, and one-quarter for ulceration of rectum—the sum of which aggregates total and twelve-eighteenths." The certificate of the board states:

We believe claimant suffers from double inguinal oblique hernia, chronic diarrhea, hemorrhoids, and ulceration of rectum, the last two disabilities being, in our opinion, due to the chronic diarrhea.

The claim has been subjected to a thorough special examination in the field by twelve special examiners of your office, with a view of ascertaining the origin of the hernia alleged, and the existence of said chronic diarrhea since discharge.

The claim was rejected October 27, 1887, upon the ground that "there is no record of disabilities alleged, and the claimant has failed, after a thorough and exhaustive investigation, to establish the origin or existence of double hernia in service, or that he has been disabled since discharge by chronic diarrhea which is attributable to any disease of his military service and line of duty."

From said action of rejection claimant appealed January 9, 1888, contending that the origin in the service and line of duty, and continuance since discharge, of both his disabilities, have been fully shown by the evidence on file, and that he is entitled therefor to a pension.

OPINION.

Appellant bases his claim for pension upon two disabilities—double inguinal hernia, which he alleges he incurred from a fall of his horse in September 14, 1861 (evidently a clerical error and intended for 1862), at Corinth, Miss., and chronic diarrhea, contracted at White River, Ark., May 10, 1865. The records of the War Department show that appellant was mustered in and served as a member of Company M, Third Michigan Cavalry, until January 3, 1864, when he re-enlisted as a veteran volunteer and was transferred to Company C of same regiment.

Claimant testifies that he incurred the hernia during an attack on Corinth, Miss., in September, 1862, and while a member of said Company M, from a fall of his horse, or by having been thrown from his horse.

The records of the War Department furnish no evidence of either the existence of, or treatment for, said hernia during appellant's military service; and he has no hospital record prior to 1864. The evidence produced on the careful and exhaustive special examinations into this claim utterly fails to support the allegations of appellant as to the origin of said disability, or to corroborate his account of the circumstances to which he attributes it. The captain, first lieutenant, first sergeant, and *numerous comrades* swear unequivocally, upon special examination, that *they never knew nor heard* of the circumstances detailed by appellant,

nor had any knowledge that he had incurred said disability during his military service. Appellant's subsequent re-enlistment, as veteran volunteer in 1864, and his subsequent service in Company C, are circumstances of great weight, tending to contradict his allegations and corroborate the testimony of his officers and comrades. Even those of his comrades, whose affidavits were originally filed in support of appellant's allegations, have, upon special examination, so explained away, modified, or expressly denied their statements as to render said affidavits wholly unsatisfactory and unreliable as evidence. Were this not sufficient, the appellant states to a special examiner, in his deposition of April, 1887, that, at the time he returned home on furlough from Lawson General Hospital, Saint Louis, in April, 1864, he was not ruptured. There is an entire failure to establish the origin or existence of said disability in the service by any satisfactory or competent evidence; and your action rejecting the claim for said disability was unquestionably proper.

The evidence on file presents some peculiar features with regard to the claim of chronic diarrhea. The records of the War Department show that appellant was a sufferer from said disease, and was treated for it in various hospitals from May 17, 1865, until his discharge, September 4, 1865. From that date until October 14, 1885 (the date of the last medical examination of appellant, and the only one showing any disability from said disease, all previous examinations developing no symptoms of such disability), the most thorough, searching, and careful investigation, extending over a number of years and exhausting every conceivable source of information, has utterly failed to establish the existence or the continuance of said alleged disability in a pensionable degree. It has been shown incidentally, however, by said investigation that appellant's course of life has been of such a grossly immoral and intemperate character that the fair presumption from such a state of facts would be that the appellant had completely recovered in 1865 from the attack of diarrhea, mentioned in the record, and that his subsequent course of life, his intemperate habits, produced the second attack of said disease from which he was found to be suffering upon his medical examination in 1885. Certainly there is a lapse of twenty years between the two attacks, during which both the testimony and the medical examinations show the disease did *not* exist, at least in an appreciable degree; and continuance during said period has not been established. The chronic diarrhea found in 1885 is too remote from that mentioned in the record to be accepted as the sequence, the result, or as in any way connected with the former attack.

Your action rejecting this claim on the grounds stated by you is accordingly affirmed.

RESTORATION: ADULTEROUS COHABITATION.

CAROLINE, MOTHER OF CHARLES KNAPPENBERGER.

Where there exists absolute proof of one act of adultery, resulting in the birth of a child, and, subsequently to said act and birth, the adulterous parties continuously sustain toward each other the relations of *apparent* illicit intercourse, the reasonable and conclusive *presumption* is that said relations are actually those of adulterous cohabitation; and the woman, if a widow and mother, can not claim pensionable *dependence* on account of the death of either a husband or a son whose death may have occurred prior to the beginning of the aforesaid adulterous habit, or anterior to the aforesaid relations of apparent cohabitation with a paramour.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 17, 1888.

Herewith are returned the papers *in re* No. 123,925, of Caroline, mother of Charles Knappenberger, Company N, Twenty-eighth Pennsylvania Volunteers, the claim being for restoration to the pension rolls.

Soldier enlisted August 17, 1861, and was reported present for the months of November and December, 1862. He died December 1, 1862, at General Hospital, Frederick City, Md., of wounds received in action at Antietam.

A certificate was issued to appellant January 26, 1869, as dependent mother of soldier, commencing December 1, 1862, the date of soldier's death. She was dropped from the rolls August 14, 1872, upon evidence showing that, since the death of the soldier, she lived and cohabited, as his wife, with one Philip C. Dotter, by whom there was one child, and that the evidence failed to show that soldier had contributed to her support.

From this action she appeals.

(George E. Lemon for appellant.)

It appears that, about the year 1857, the soldier's father had died, before his enlistment, and that the appellant was, a year or two after her husband's death, employed by one Philip C. Dotter. The evidence as to the relations existing between them is somewhat conflicting, but, prior to the enlistment of the son, she bore a child to said Dotter, and remained upon the premises until the year 1872. She denies that there was ever any unlawful intercourse after the son's enlistment, and that she simply continued there in the capacity of a servant, as she had been before the one unfortunate act, which, she claims, was never repeated.

The affidavits of Jacob Shitz, of the two sons of Philip Dotter, and of Levi Kuchner and Samuel Meckus, filed by appellant in support of this application for restoration, tend to sustain the statement as to her relations with Dotter after the birth of said illegitimate child, but, from the very nature of the case, they are necessarily vague and unsatisfactory, being merely to the effect that, "so far as known" by the witnesses, the appellant lived a virtuous life while she remained an inmate of Dotter's house from 1859 to 1872, with the exception of the sin-

gle act which resulted in the birth of said child. Such testimony is simply to the effect that, with the exception of the "unfortunate occurrence" which was made patent to all the world by its unavoidable results, they could not, as is but natural, swear positively and from personal knowledge as to the character of the association of said Dotter and appellant during the remaining period that she lived in his house, except that, as no further "results" followed from said intercourse, it was presumed to be innocent and virtuous.

It is admitted by the appellant that she went to reside as a servant or housekeeper in the family of said Dotter in 1859, that she had a child by him in 1860, and that she remained continuously an inmate of his household in the same capacity until 1872, when she was dropped from the pension rolls. The evidence taken at the time, and upon which said action terminating her pension was based, is full and explicit as to the above admitted facts, and also that appellant continued during all of said time to live with said Dotter upon precisely the same terms and under the same conditions and surroundings, so far as could be discovered by neighbors, friends, and relations, both prior and subsequent to the birth of Dotter's child.

It is unnecessary, here, to enter upon a discussion of the effect of the immoral act of appellant, resulting in the birth of said child, upon her title to a pension. Said child was born prior to the enlistment of the son in the Army, and long prior to his death; and appellant was not dropped from the rolls by reason of having been guilty of said act, or having given birth to an illegitimate child at that time—and it is the merest quibble, an evasion of the real question, to contend that she was. She was dropped from the rolls, properly and justly so, for the reason that, after the birth of said child, which, she asserts, was the result of a single departure from the path of virtue, but which was never repeated, she continued to live for twelve years under the roof and in the family of the man who was the father of her child, occupied toward him the same relations, performed for him the same services, and received from him the same support during said period, so far as could be observed by the outside world, as she had done prior to what she terms "the single unfortunate occurrence" with said Dotter. The birth of said illegitimate child prior to her son's enlistment, while it would not in itself deprive her of her right to pension under the law, stamps her subsequent residence and continuous association with said Dotter with an indelible stain of immorality, which can not be mistaken nor gainsaid, and makes the presumption conclusive and irresistible to all fair and impartial minds that *such* an association was one of "open and notorious adulterous cohabitation."

It is inconceivable that a woman, who had been so unfortunate as to "step aside" but once from the path of rectitude, and who had repented *of her error, would continue* to live for years under the roof of and in *daily familiar intercourse* with her partner in guilt, upon the same terms *that previously existed,* with the finger of scorn pointing at her and the

odium of disgrace resting upon her, and yet maintain a virtuous and innocent course of life. Such a state of affairs necessarily implies the relation between the parties, of mistress and paramour; and, as has been well said by the Department, such relation, while it existed, precludes the idea of the dependence of the mother upon the soldier. In view of the repeated ruling of the Department that the relations existing between the parties need not be such as would, at common law, constitute a re-marriage, to terminate pension, the contention of the appeal, that the evidence does not show that appellant indulged in such acts and to such a degree as would constitute a re-marriage under the laws of the State of Pennsylvania, can have no force.

The principal contention of the appeal is to the effect that, as the testimony upon which was based your former action, dropping appellant from the rolls, was obtained by means of a special *ex parte* examination, under the present rules of your office and in accordance with the spirit of the act of Congress approved July 25, 1882, she should be accorded another special examination with opportunity to face and cross-examine the witnesses who testify against her.

While it is, and has been, the uniform practice of your office to grant such requests under like circumstances in cases where there was any probability of the second special examination eliciting evidence in any manner material to the claim, or correcting errors or mistakes, yet, in the present case, with the fact of the birth of said child and her subsequent continued residence with Dotter admitted by appellant, it is not perceived how such second examination could affect the final determination of this claim, in view of the position taken by the Department with reference to appellant's admitted conduct as herein discussed.

For the above reasons, your action rejecting this claim for restoration is approved.

LINE OF DUTY—NAVY.

FLORENCE N., WIDOW OF ALBERT T. COWIE.

1. Any person who may be pensionable in the naval service, and who incurred death or a pensionable disability therein, will be considered as in the line of duty for pensionable purposes, if acting in conformity with the established regulations of the Navy when said death or disability was incurred.
2. Line of duty in the naval service is determined by the established "regulations of the Navy;" and a medical certificate, given by the proper medical officers reporting, in accordance with said "regulations," the cause of death or the origin of the alleged disability as in the line of duty, will be accepted as the best record evidence going to show title to pension.
3. The circumstances determining what constitutes line of duty in the naval service differ from those which fix the line of duty in the Army.

Assistant Secretary Hawkins to the Commissioner of Pensions. February 27, 1888.

I herewith return to you the papers accompanying the appeal of *Florence N., widow of* Albert T. Cowie, late paymaster's clerk, U. S.

Navy, from the decision of your office adverse to her claim for widow's pension, certificate No. 4650.

The deceased sailor enlisted October 30, 1886, and died in service, February 24, 1887.

The declaration of widow of deceased sailor was filed May 17, 1887, alleging that "she is the widow of Albert Taylor Cowie, who was drowned under the name of Albert Taylor Cowie off La Brea, Trinidad, on the 24th day of February, A. D. 1887, in the Navy of the United States as paymaster's clerk, on board the United States ship, *Saratoga;* who was drowned by the capsizing of the fourth cutter of the United States ship, *Saratoga*, in the Gulf of Paria, off La Brea, Trinidad, while returning to the ship from Pitch Lake, the cutter being struck by a squall about 2.30 p. m. on the 24th of February, A. D. 1887."

The certificate of death, issued April 30, 1887, is in the following terms:

I hereby certify that Albert Taylor Cowie, who was a paymaster's clerk in the U. S. Navy, while attached to the United States ship *Saratoga* and holding the rank above mentioned, departed this life in the Gulf of Paria, Trinidad, West Indies, on the 24th day of February, in the year 1887, and he died of submersio, as set forth in the record of the case, as follows: By the swamping of the ship's fourth cutter the deceased was thrown into the water, where he remained for more than two hours before he was drowned. Body not recovered.

There is good evidence that the disease (or disability) causing death was in line of duty, the facts being as follows: While returning from La Brea Point to the ship the boat was swamped in a squall, and the deceased was drowned.

R. C. PERSONS,
Surgeon, U. S. Navy.

COMMANDANT'S OFFICE, UNITED STATES TRAINING STATION.

Approved. Forwarded April 23, 1887.

A. P. YATES,
Captain, Commandant.

This claim was rejected by your office on the ground that "the cause of death from drowning was not due to the service and line of duty. The deceased was on leave of absence, with permission to visit Pitch Lake, Trinidad, and while returning to the ship the boat was swamped, and while attempting to save himself was drowned."

The present appeal is taken from the foregoing adverse decision, claimant contending that, as the deceased sailor was returning to the vessel under orders to return at a certain hour, he was in the line of duty when drowned.

OPINION.

The exclusive inquiry arising upon this appeal is, whether or not Albert T. Cowie, the deceased sailor, whose widow is the appellant, was in the line of duty when, as shown by the evidence in the accompanying papers, he was drowned, February 24, 1887. Following are the facts upon which the claim is based: On the 24th day of February, 1887, the deceased sailor, a paymaster's clerk, and others in the naval service on board the United States flagship, Saratoga, then anchored

off the island of Trinidad, received permission from the commandant to visit Pitch Lake, Trinidad, in a cutter, and, whilst returning to the ship under orders which required them to return by a certain hour, the boat, or cutter, was swamped by a squall, and the deceased, with others, was drowned in the Gulf of Paria. Upon these facts, the question as to line of duty arises for consideration.

In the report accompanying this appeal, February 7, 1888, you make the following statement:

In adjudicating the claim of Louis Hesse, mother of Hugo H. Hesse, seaman United States ship *Saratoga*, No. 4646, who was drowned by the same accident that caused Mr. Cowie's death, the following appears: In response to Bureau letter as to whether the party that left the *Saratoga* to visit Pitch Lake, island of Trinidad, were acting under orders and in the line of duty, Mr. J. E. Walker, Chief of Bureau, Navy Department, says: "In reply, I have to say that it appears that the party left the *Saratoga* in one of the cutters of that vessel on leave of absence with permission to visit Pitch Lake, but under orders to return on board by a certain hour; and it was while in the act of returning that the cutter was swamped, by which accident Hugo H. Hesse, armorer of the *Saratoga*, and three others lost their lives." There is no other evidence in the Department to show that the accident occurred in the line of duty.

Your office, in view of the foregoing statement, rejected the pending claim upon the ground that "it does not appear that the accident, causing death, was in any manner connected with or incident to military duty." From this conclusion, the Department respectfully dissents, for the reasons which follow:

(1) It is apparent from the evidence in the accompanying papers that the deceased sailor (Cowie) received from the commandant of the flag-ship, *Saratoga*, permission with others to visit Pitch Lake on the Island of Trinidad, off which the ship itself was temporarily anchored. It is also apparent that the permission which was granted by the commandant was coupled with an order that required the deceased sailor and his comrades to return on board the ship by a certain hour. In view of these facts, it is reasonable to infer that the "permission" or "liberty pass" granted by the commandant as aforesaid was not only consistent in itself with the regulations of the service, but with a purpose that was embraced in the specific objects of the service at the above-mentioned time and place. It was evidently given to enable the deceased sailor (Cowie) and his comrades to make an inspection of Pitch Lake while the flag-ship lay at anchor off Trinidad, with a view, probably, to gaining valuable information for the benefit of the Government or of the service. Though not a matter of evidence in the accompanying papers, it may, nevertheless, be properly stated that it is customary, when ships of the American Navy are at anchor in distant waters, for commandants to grant permission to persons in service on board to visit neighborly objects of interest, under restrictions or orders; and such visits of inspection, although contributory to the pleasure of the participants, may be fairly considered as being in harmony with the objects and the scope of the service, and constructively, if not strictly, within

the line of duty. The "liberty pass," differing substantially and essentially from an army furlough, did not place the sailor at any time beyond the supervision of his commandant. In this case, the "permission" given by the commandant of the *Saratoga* was confined to the use of a cutter belonging to the flag-ship and controlled by a petty officer thereof; and it was, therefore, not only restricted to the lines of the service, but inseparably associated with a *specific order* which required the deceased sailor (Cowie) and his comrades to return in said cutter on board the ship at a certain hour. The aforesaid specific order was evidently made in conformity with that regulation of the naval service which prescribes that "the petty officers and men belonging to vessels in the Navy will be permitted to visit the shore on suitable occasions, when it can be done without injury to the public service", but "no leave of absence is granted to any officer belonging to a vessel under sailing orders, to go beyond the limits of the place or station." The evidence in the accompanying papers shows the fact that "it was while in the act of returning that the cutter was swamped in a squall, whereby Cowie and several others lost their lives." Cowie and the others had been to Pitch Lake by virtue of a "liberty pass" or permission which, inasmuch as it was not compulsory, it was in either their power or their discretion, originally, to waive or forego; but, in accepting it, they remained in at least the constructive line of duty, because under the circumspection and control of their superiors in the service; and, therefore, the consequent risk was not wholly theirs. The act of going did not separate them from the path of obedience, while the act of returning could not, because done under and in pursuance of an order which they had neither the power nor the right to waive, much less to disobey; and, hence, while performing both of said acts, they were in not only the constructive, but the direct and active line of duty—the squall by which the cutter was swamped becoming an unavoidable incident to the line of duty in the service. Cowie and his comrades could not have been legitimately punished for declining to accept the permission, or "liberty pass," to visit Pitch Lake; but, they would have become liable to prompt and severe punishment, had they declined or failed to obey the order to return in the cutter to the flag-ship, as required, by a certain hour.

(2d.) In determining, however, the question relating to the line of duty, the Department is not confined to the foregoing course of reasoning upon the facts which appear in the accompanying papers. That course of reasoning is amply fortified by the record itself, which describes in official terms the circumstances of the deceased sailor's death. I find in the "Regulations for the Government of the United States Navy (1870)," p. 220, Article XXVI, paragraph 1417, under the title of "Pensions," the following regulations:

Commanding officers, on shore and afloat, will require from the proper medical officers, serving under them, reports according to form of every case of death or disa-

bility occurring to persons in the naval service under their command. These reports will specify the immediate or remote cause of death, and, in cases of disability, the nature and the degree of the disability incurred, and will be forwarded with the special report as above directed, to the Secretary of the Navy, in order to furnish evidence as to claims for pensions. In all such cases as provided for above, surveys shall not be requisite to establish claims for pensions.

The "special report" referred to in the foregoing paragraph is that of the commanding officer of the vessel, which is required in pursuance of preceding paragraphs of the aforementioned regulations, and which will be made in triplicate and state clearly, but briefly, the circumstances under which the death, wounds, injury, or disability occurred, and, distinctly, whether or not in the line of duty.

I find upon an examination of the accompanying papers that the afore-mentioned "Regulations of the United States Navy" were faithfully observed and obeyed with reference to the death of the deceased sailor, Cowie. The proper medical officer, serving under the commandant of the *Saratoga*, made to him, April 20, 1887, and he "approved" and "forwarded" to the Secretary of the Navy, April 23, 1887, a report of the "immediate cause" of the said sailor's death, in the following terms:

I hereby certify that Albert Taylor Cowie, who was a paymaster's clerk in the United States Navy, while attached to the U. S. ship *Saratoga*, and holding the rank above mentioned, departed this life in the Gulf of Paria, Trinidad, W. I, on the 24th day of February, in the year 1887, and he died of submersio, as set forth in the record of the case as follows: By the swamping of the ship's fourth cutter the deceased was thrown into the water, where he remained more than two hours before he was drowned. Body not recovered. There is good evidence that the disease (or disability) causing death was *in line of duty*, the facts being as follows: While returning from La Brea Point to the ship the boat was swamped in a squall, and the deceased was drowned.

R. C. PERSONS,
Surgeon, U. S. M.

COMMANDANT'S OFFICE, U. S. TRAINING STATION.
Approved, forwarded April 23, 1887.

A. P. YATES,
Captain, Commandant.

The foregoing certificate of death, written as required in such cases by the regulations for the Navy, being record evidence, is entitled to the same significance as that which is possessed by a surgeon's certificate of disability granted to a soldier in the army service. It is a record made contemporaneously with the soldier's death, to which it relates, and, like a surgeon's certificate, "possesses a value superior to all other testimony in relation to the existence and signification of a given state of facts." The certificate given in this case by Surgeon R. C. Persons, and approved by A. P. Yates, captain commandant, must, in the absence of proof showing fraud or mistake, be accepted by the Department as conclusive evidence of the "state of facts" which it discloses. It is recognized as legitimate evidence of claimant's title to pension, inasmuch as it presents a prima facie case of line of duty in the serv-

ice, as required by the "regulations" appertaining to naval pensions, under the aforesaid Article XXVI. It is, in fact, "a voucher for a claim for pension." The principle upon which this regulation of the service is based—viz, that the line of duty is the path of obedience—is not only consistent with good policy, but faithful to the spirit and the intent of the pension system.

(3) The fact that the deceased sailor lost his life as a consequence of the aforesaid squall in the Gulf of Paria, while returning from La Brea Point to the ship, gives emphasis to the dutiful purpose by which he was guided in his endeavor to obey the order of the commandant. The fatal result was in no sense caused by the deceased sailor's contributory negligence or imprudence. It was a Providential interference; and this fact impels the Department to suggest that, while it is possible to provide means or ways to avert or to overcome the casualties incident to a display of human power, it is impossible either to avert or to overcome the ways of Providence, and hence arises the venerated doctrine that an act of God excuses man from both liability and responsibility for its consequences. The squall that swamped the cutter in which the deceased sailor was returning, under order, to shipboard, as narrated in the foregoing history, was an act of God; and the Government can reap no advantage from its result, involving, as it did, the loss of Albert T. Cowie's life.

For the foregoing reasons, I sustain this appeal, and respectfully direct that the widow of Albert T. Cowie be put on the roll of pensioners in accordance with the law and the regulations of your office that may be applicable to her claim.

ACT OF AUGUST 4, 1886.

JOHN ADAMS.

In order to be entitled to $45 per month, under the act approved August 4, 1886, claimant must have lost either an arm at the shoulder joint or a leg at the hip joint, or so near the joint as to prevent the use of an artificial limb; nor has the Department any discretionary power to modify the specific requirement of the law. A literal compliance with the act is evidently necessary on the part alike of the claimant and of the Department.

Assistant Secretary Hawkins to the Commissioner of Pensions, March 17, 1888.

Herewith I return to you the papers which accompanied the appeal of John Adams, late of Company F, Fifty-second Regiment Indiana Volunteers, from the action of your office adverse to his claim for increase of pension, certificate No. 31079.

The basis of claimant's original declaration is loss of right arm by accidental discharge of cannon in the line of duty, March 31, 1863. In certificate of disability for discharge, the captain of claimant's company

certifies that claimant was "severely wounded by premature discharge of a siege gun, March 31, 1863, while ramming a cartridge by order of sergeant, causing the loss of his right arm;" and the surgeon certifies that "right arm is amputated at upper third of humerus; right leg is also seriously impaired."

Claimant is pensioned at the rate of $36 per month for his disability, and appeals from the rejection of his claim for increase from $36 to $45 under the act of August 4, 1886.

It appears from the report of the board of surgeons at Allerton, Iowa, October 28, 1885, that claimant's arm was amputated "seven inches from shoulder joint to end of shaft. It is 5 inches from surgical neck to end of shaft."

OPINION.

The claimant in this appeal is pensioned at $36 per month for the loss of his right arm "above the elbow," in accordance with the act of August 4, 1886, which provides that "all persons now on the pension rolls, and all persons hereafter granted a pension, who, in like manner, shall have lost either an arm at or above the elbow, or a leg at or above the knee, or been totally disabled in the same, shall receive a pension of $36 per month." Claimant now alleges that the disability arising from the loss of his right arm is such as to entitle him to an increase from $36 to $45 per month under the act of August 4, 1886, which, in addition to the provision for $36 rating, also provides that "all persons now on the pension rolls, and all persons hereafter granted a pension, who, in like manner, shall have lost either an arm at the shoulder joint or a leg at the hip joint, or so near the joint as to prevent the use of an artificial limb, shall receive pension at the rate of $45 per month."

The merit of this appeal is to be determined by the requirement cited in the provision in the act of August 4, 1886, whereby the rating of $45 per month may be conferred upon a claimant. The requirement, which is a precedent to the condition of that rating, is that claimant shall have lost "either an arm at the shoulder joint or a leg at the hip joint, or so near the joint as to prevent the use of an artificial limb." It appears, however, from the evidence in the accompanying papers, that the arm which claimant lost "above the elbow," and by reason of which he is pensioned at $36 per month, was amputated not "*at* the shoulder joint," but, as stated by the Allerton Board of Examining Surgeons, "seven inches from shoulder joint to end of shaft," and "five inches from surgical neck to end of shaft." This fact distinctly places claimant's disability in a classification which, in conformity with the arbitrary terms of the statute, is not entitled to $45 per month; nor has the Department any discretionary power to modify the specific requirement of the law. A literal compliance with its terms is evidently necessary *on the part alike of* the claimant and of the Department.

In view of the number of inches from the "shoulder joint" the act of *amputation was done*, claimant can not say that he is entitled to $45 per

month by reason of the amputation being "so near the joint as to prevent the use of an artificial limb," inasmuch as, even if such were the fact, the construction which claimant puts upon the law would violate its evident intention. It is apparent that such a construction would be equivalent to using an exceptional case as the guide by which to determine the general meaning and object of the statute. The evidence in the accompanying papers shows that the actual amputation of claimant's arm, "above the elbow," was remote from, rather than near to, the "shoulder joint" as required by the statute; and, therefore, no reasonable ground exists for increasing his pensionable rating from $36 to $45 per month. Claimant is now receiving all that the law allows for the loss of his arm "above the elbow."

The rejection of the claim for increase was not error, and is, therefore, affirmed.

OVERPAID PENSION—RE-IMBURSEMENT.

CYRUS PIKE.

1. Where pension money is illegally paid to and received by a pensioner whilst in the service, the sum so paid is regarded as being "in direct violation of the statutory provision (viz, section 4724) positively forbidding such payment or receipt," and, therefore, as being "a positive, actual *fraud* upon the Government." It is further held that the Government may re-imburse itself for such illegal overpayment by withholding pension money falling due to the aforesaid pensioner.
2. The conclusions reached in the decision of the case of James Moss, March 28, 1881, are erroneous, and said decision is reversed in so far as it is inconsistent with the present ruling of the Department.

Assistant Secretary Hawkins to the Commissioner of Pensions, March 9, 1888.

Herewith are returned the papers in the claim for a restoration of pension deducted from payments made on pension certificate No. 91785, of Cyrus Pike, private Company D, Thirtieth Indiana Volunteers.

The basis of this claim is gunshot wound of left thigh, chronic diarrhea, and resulting dyspepsia.

Claimant, in original application, filed June 8, 1866, alleges gunshot wound of right knee, received at battle of Pittsburgh Landing, Tenn., April 7, 1862; in application filed February 8, 1886, he alleges chronic diarrhea and dyspepsia, results of pneumonia contracted about the middle of May, 1864.

The records of the War Department show that claimant enlisted September 24, 1861, as private, Company D, Thirtieth Indiana Volunteers, and was discharged July 11, 1862, for disability. He re-enlisted November 17, 1863, as private, Company B, One hundred and twenty-ninth Indiana Volunteers, and was discharged, to date March 31, 1864, *to accept promotion to* second lieutenancy, same company and regiment. *He was mustered into* service, to date April 2, 1864, as second lieuten-

ant, Company B, One hundred and twenty-ninth Indiana Volunteers and mustered out with company, August 29, 1865.

September 27, 1866, claimant was granted a pension at the rate of $4 per month from September 3, 1866, for gunshot wound right leg; on January 7, 1869, he was allowed a re-issue at $4 per month from July 7, 1862; on June 15, 1874, he was granted an increase to $6 per month from April 1, 1874; on October 8, 1886, he was allowed a re-issue at $4 per month from July 12, 1862, $6 per month from April 1, 1874, and $9.75 per month from February 8, 1886, for gunshot wound right leg and chronic diarrhea (deducting time from November 17, 1863, to August 29, 1865, inclusive, and payments). On May 10, 1887, his pension was increased to $13.50 per month from February 16, 1887, for gunshot wound right thigh, chronic diarrhea, and resulting dyspepsia.

The claim is now before the Department on an appeal filed August 9, 1887, in which the appellant excepts (under the decision of Secretary Kirkwood of March 27, 1881, in the claim of James Moss, Vol. VIII, page 113, Secretary's Decisions), to the action of the Commissioner of Pensions of October 8, 1886, in directing that so much of the money paid appellant as pension be withheld until sufficient shall have been retained by the Government to re-imburse it for money paid appellant as pension for the time he was in the U. S. Army, subsequent to his first service.

OPINION.

The question that arises upon this appeal relates exclusively to the right of the Government to re-imbursement for an illegal payment of pension money to a pensioner who was not lawfully entitled to said money for the time during which said payment was made, and, furthermore, to the question whether the Government, in order thus to be re-imbursed, may retain or withhold from payment to a pensioner money which has accrued upon a lawful pension. The Commissioner of Pensions directed, October 8, 1886, that so much of the pension money that had been paid claimant from November 17, 1863, to August 29, 1865, be withheld from claimant as was necessary to re-imburse the Government for money paid him as pension for the time he was in the U. S. Army subsequent to his first service; and from said order the claimant appeals, citing the ruling of the Department, March 28, 1881, in the claim of James Moss (Vol. VIII, page 113, Secretary's Decisions), in support of his position.

The statutory provisions touching upon this question are to be found in the act of January 25, 1828, the act of May 20, 1836, and the act of April 10, 1844, now sections 1766, 4734, and 4724 of the Revised Statutes, respectively, and upon a proper construction of these acts the correct decision of this question depends.

Section 1766 is as follows:

No money shall be paid to any person for his compensation who is in arrears to the United States, until he has accounted for and paid into the Treasury all sums for

which he may be liable. In all cases where the pay or salary of any person is withheld in pursuance of this section, the accounting officers of the Treasury, if required to do so by the party, his agent, or attorney, shall report forthwith to the Solicitor of the Treasury the balance due; and the Solicitor shall, within sixty days thereafter, order suit to be commenced against such delinquent and his sureties.

Section 4734 provides:

The provisions of law which allow the withholding of the compensation of any person who is in *arrears* shall not be construed to authorize the pension of any pensioner of the United States to be withheld.

It is evident from a mere perusal of said section 1766, that it has no reference to any liability from a person to the United States except such as can be designated as "arrears," and it is also equally clear from the language used in section 4734 that the inhibition therein contained applies only to the character of liability mentioned in said section 1766. In other words, the law provides, in section 1766, that no money shall be paid to any person as compensation who is "in arrears" to the Government, until he has made good his indebtedness, and, in section 4734, that the provisions of the former section shall not be construed to authorize the withholding of a pension to pay such indebtedness to the Government as is therein designated.

The decisive question to be considered here is: Does the liability of the appellant for the amount of pension illegally paid to and unlawfully received by him constitute such an "arrearage," or "debt," due from him to the Government as is contemplated in the foregoing sections? If it does, then the Government is forbidden by section 4734 to withhold his pension for the purpose of re-imbursing itself therefor. If it does not, there is no principle in reason, in law, nor in justice, to prevent it from so doing.

The answer to this question would seem to be obvious from a moment's consideration of the language used in said sections. The latter section is limited by its terms to "the provisions of law which allow the withholding of the compensation of any person who is in arrears, etc." Those "provisions of law" are all contained in said former section; so, it follows, necessarily, that the inhibition forbidding the withholding of a pension by the Government can only apply to such cases of liability as are included in said section 1766.

Said section 1766 is explicit in stating that "no money shall be paid to any person for his compensation, etc;" and it further provides that, "in all cases where the pay or salary of any person is withheld in pursuance of this section," the proper officials shall, if required so to do, report to the Solicitor of the Treasury "the balance due," and the Solicitor shall, within sixty days, cause "suit to be commenced against such delinquent and his sureties." The words "compensation," "pay," "salary," "the balance due," "delinquent," used in said section in describing what money may be withheld by the Government and the class *of persons to whom the* statute is intended to apply, are wholly *incompatible with the idea of* pension or of pensioner.

Pension is in no sense "compensation," "pay" or "salary;" nor can the person unlawfully in receipt of a pension be termed a "delinquent," nor is such sum in his hands a "balance due." But, further, said section makes provision for suit to be instituted to recover the "balance due" the Government, whenever so required, "against such delinquent and his sureties," thus conclusively showing that the only liability intended to be covered by the act was that arising from a failure to properly account for funds lawfully coming into their hands, by officials and employés of the Government, and where the interests of the Government are protected by official bonds, as in all cases where the handling of public funds is intrusted to an individual.

The pension money illegally paid to appellant was, on the contrary, received by him unlawfully and tortuously, and said section has clearly no application to such a case.

Futhermore, section 1766 provides: "No money shall be paid to any person for his compensation who is in arrears, etc.;" and section 4734 says that: "The provisions of law which allow the withholding of the compensation of any person who is in arrears shall not be construed, etc." The word "arrears" is defined by Webster to mean: "That which is behind in payment, or which remains unpaid, though due." He also states: "It is generally used in the plural, as, the arrears of rent, wages, and taxes, and supposes a part of the money already paid."

Bouvier, in his law dictionary, defines it as "The remainder of an account or sum of money in the hands of an accountant. Any money due and unpaid at a given time." It is thus seen that both in its general and ordinary, as well as in its technical and legal, signification the word "arrears" has a fixed and definite meaning which determines and clearly designates the character of the liability to which it can be applied, and which is described by its use. The liability designated by the word "arrears" must necessarily arise from the failure to account for funds lawfully in the hands of the person thus described, or a failure to comply with the conditions of a contract, or to meet an obligation lawfully entered into or assumed. It is "the remainder of an account or sum of money in the hands of an accountant," and necessarily precludes the idea of a liability for money or property fraudulently or illegally obtained.

If this be the true interpretation of said word as used in the sections of the statute aforesaid, in what sense can appellant be said to be "in arrears" for the amount of pension unlawfully paid him for the time of his second service, and for the withholding of which he complains in this appeal? If he is not "in arrears" for the amount so received, then said sections do not apply to his case, and the ordinary rules of common honesty and justice would demand that the Government be re-imbursed for said amount by withholding it from the pension lawfully *due him.*

It is, however, contended by the appellant that said amount so paid him should be considered, in the absence of fraud, as in the nature of "money had and received by mistake," and constituting a "debt" from him to the Government, for which the Government is precluded from re-imbursing itself by withholding his pension by reason of the statutory inhibition above quoted; and, in support of his position, he relies upon the decision of the Department, March 28, 1881, in the analogous claim of James Moss. (Vol. VIII, p. 113, Secretary's Decisions.)

It is true that said decision sustains this view, and holds that the amount so received does constitute a "debt" due from the pensioner to the Government, and against which the Government is forbidden to offset the lawful pension allowed him and to repay itself, withholding the same and applying it to the liquidation of said "debt."

It appears, from an examination of said decision, that it is based upon an opinion rendered by Attorney-General B. F. Butler, as Secretary of War *ad interim*, March 13, 1837, in the case of Captain Vernon (Mayo and Moulton, page 516), in which it is held: "Except when the overpayment has been made by fraud, I think it most agreeable to the spirit of the pension laws to treat the overpayment in the light of money paid and received by mistake, and constituting a debt from the pensioner to the United States, which is no bar to the payment of the pension, according to the equity of the act of 20th May, 1836." (Sec. 4734, Revised Statutes.)

But in basing said decision of the Department upon the view of the law taken by Attorney-General Butler in 1837, the fact seems to have been overlooked that, subsequent to that date, Congress, by the act of April 30, 1844 (sec. 4724, Revised Statutes), has directly forbidden, and in express terms inhibited, the payment of a pension for any time during which the pensioner was in receipt of the pay of his rank or station in the service, as follows: Sec. 4724. "No person in the Army, Navy, or Marine Corps shall draw both a pension as an invalid and the pay of his rank or station in the service, unless the disability for which the pension was granted be such as to occasion his employment in a lower grade, or in the civil branch of the service."

In the absence of any positive enactment forbidding the payment of pension under said circumstances, or in case of the payment by mistake of a greater amount than the pensioner was entitled to receive, constituting a simple case of overpayment, the Attorney General held, in 1837, that the amount so received might, in the absence of fraud, constitute a "debt," and come within the equity of the act of May 20, 1836 (sec. 4734, Revised Statutes); but the pension unlawfully paid to appellant for the period that he was in receipt of the pay of his rank in the military service, and illegally received by him in direct violation of a statutory provision positively forbidding such payment or receipt, does not *come within the scope* of said opinion; nor can it be held in

any sense to constitute a "debt" due by appellant to the Government in the ordinary acceptation of that term.

But even under the law as it then existed, the Attorney-General held that the "equity of the act of May 20, 1836" (sec. 4734, Revised Statutes), could be extended to such a case only "in the absence of fraud."

Do the facts of the claim under consideration admit of the element of fraud being eliminated from its consideration?

A moment's consideration of the rules and regulations governing the payment and receipt of pensions compels the above question to be answered in the negative. In order to obtain his arrears of pension, covering the period of his second service, from November 17, 1863, to August 29, 1865, appellant was required to subscribe and swear to an affidavit, in which he distinctly stated that he had not been in the military service of the United States since the date of the commencement of said pension; and this he did upon each occasion when he received payment of said pension. Under these circumstances the making and swearing to said false affidavits, for the purpose of enabling him to draw said pension, was a positive, actual fraud upon the Government. He can not be permitted to claim that he had subscribed and solemnly sworn to said statement through ignorance or mistake. Such a position would tend to stultify claimant; it would be obnoxious to every correct principle of right and justice, and, at the same time, utterly destructive of the force and effect which the law gives to an act executed with solemnity and verified by oath.

For the foregoing reasons, the Department is of the opinion that the conclusions arrived at in the decision of the case of James Moss, March 28, 1881, cited by appellant in support of his appeal, are erroneous; and said decision is overruled, in so far as the same is inconsistent with the views herein expressed.

Your action herein is affirmed.

PRESUMPTIVE EVIDENCE.

DAVID A. SAWYERS.

Where it appears more probable from the evidence that claimant's disability originated from causes to which he was necessarily exposed while in the line of duty than from causes having no necessary connection with the service, it is held that the disability alleged was due to the former causes. Upon this point the presumption, in the absence of evidence to the contrary, must incline toward the claimant.

Assistant Secretary Hawkins to the Commissioner of Pensions, March 17, 1888.

Herewith are returned the papers which accompanied your report of the 18th of January, 1888, upon the appeal of David A. Sawyers, who was a hospital steward U. S. Army, from the decision of your office *rejecting his claim* for pension No. 414078.

The said David A. Sawyers was enrolled on the 25th of December, 1863, and was a private in Company C of the Thirty-six th Regiment of Iowa Volunteers, having joined that company on the 24th of February, 1864. On the four months' muster-roll, dated June 30, 1864, he is reported present, on extra duty as nurse in regimental hospital since March 10, 1864. On the roll for August 31, 1864, he is reported detached and acting as hospital steward of post at Little Rock. He was discharged October 22, 1864, by order of the Secretary of War. He was enlisted October 22, 1864, as a hospital steward U. S. Army, and was discharged June 6, 1865, on account of disability. In the certificate of disability for discharge, Dr. Thomas D. Washburn, assistant surgeon One hundred and twenty-sixth Illinois Volunteers, post surgeon at Little Rock, Ark., states:

Have carefully examined David A. Sawyers, hospital steward U. S. Army, and found him "incapable of performing the duties of a soldier because of chronic retinitis of left eye and paralysis of right, from injury before entering the service. His sedentary life subjects him to great derangement of stomach and bowels, assuming an obstinate form of diarrhea, which disqualifies for service. Disability one-third."

Dr. Washburn states further:

Having suffered from acute diarrhea, said Sawyers has frequent attacks of this kind during warm weather; he is also nearly blind of right eye and has some disease of left which has been aggravated since entering the service.

On the 4th of January, 1881, Mr. Sawyers filed a declaration for pension, in which he alleged that at Little Rock, Ark., in June, 1861, he "contracted loss of sight of left eye from exposure."

In an affidavit made on the 3d of October, 1881, Mr. Sawyers states that he claims pension on account of amaurosis, contracted about April 20, 1865, at Little Rock, Ark., while suffering from acute diarrhea and general debility.

The claim was rejected by your office on the ground that the cause of the applicant's disability existed before he enlisted.

From this decision the appeal is taken.

It appears from the evidence that some eighteen months before the claimant enlisted he suffered from inflammation of the external coat of the right eye, which was produced by its being rubbed by claimant's coat sleeve while he was playing ball. There is, however, quite a mass of testimony going to show that the claimant had recovered from the disease of the right eye before he entered the service. Dr. Thomas D. Washburn, with whom claimant served as hospital steward in 1864 and 1865, states that claimant's right eye had suffered previous to the attack in the service, but had entirely recovered. Dr. S. H. Sawyers, a brother of claimant, testifies that, under the treatment of himself and Dr. J. C. Hughes, claimant had fully recovered from the affection of the right eye which he had before he entered the service, which affection was conjunctivitis, with thickening of the membrane over a portion of the cornea. It did not affect the deeper structures of the eye, and was not in any manner connected as a cause with the attack of the left eye

which claimant had suffered while in the service. He saw claimant at Little Rock, Ark., in February, 1864. He was then free from any disease of the eye. Dr. H. H. Hoffman testifies that applicant suffered with conjunctivitis of the right eye in the summer of 1862, but he had recovered before he entered the service. Affiant studied medicine in the same office with the claimant in 1863, and he was then free from any disease of the eye. Dr. E. F. Horton testifies that he knows that, some time in 1862, claimant suffered from inflammation of the conjunctiva of the right eye, but in 1863, when he enlisted, he had entirely recovered.

R. M. Hicks and J. C. McAdams testify that, in the fall of 1862 and winter and spring of 1863, they attended a school taught by claimant; that, so far as they knew, he had no disease of the eyes at that time. Jacob A. Leavell states that he was going to applicant's school at the time he enlisted; did not notice anything peculiar about his eyes at that time.

James G. Conley, Lewis Hyatt, Joseph Bivin, Nathaniel C. Freeman, B. S. Vierling and Kelita P. Morrison, who knew the claimant while he was in the service, testify that at the time he enlisted he was free from disease of the eyes.

A. McKeever and John J. Hicks testify that before applicant entered the service he had fully recovered from the affection of the left eye which he had in 1862.

On the 4th of August, 1887, the medical referee gave the opinion that "the injury to the right eye in this case can be eliminated in the consideration of the claim for loss of sight of left eye." Upon this opinion your office receded from the view that the injury to the right eye, received before enlistment, was the cause of the existing disease of the left eye. On the 3d of September, 1887, your office rejected the claim on the ground that the loss of vision of the left eye is not proved to be due to any cause arising in the service and line of duty.

The weight of the evidence is in favor of the view that at the date of enlistment the applicant had recovered from the disease of the right eye, which was due to an injury received in August, 1862, and that the disease which existed at the date of discharge was of a different character. The legal presumption that he had no disability when he entered the service appears to be sustained by the evidence.

The question to be determined in the case is, whether it is more probable from the evidence that the disability originated from causes to which the applicant was necessarily exposed while in the line of duty, than from causes having no necessary connection with the service. Upon this point also the presumption, in the absence of evidence to the contrary, must incline toward the claimant. Dr. Washburn, in an affidavit made on the 8th of March, 1883, states that applicant *contracted sore eyes from* waiting upon patients suffering with sore eyes; *that sore eyes were* prevalent among the soldiers at the time. In an

affidavit made on the 6th of June, 1882, Dr. Washburn states that he believes that claimant's close attention to duty developed the eye disease from which he is suffering. It is very frequently impossible to trace the cause of disease. There is nothing in the evidence in the case to show that while the soldier was in the service any cause outside of those to which he was subjected in the line of duty operated to produce or to aggravate the disease of eyes.

The weight of the evidence is in favor of the view that the disease of the eyes under which the applicant is laboring was contracted in the line of duty in the service. You will please, therefore, issue a certificate granting him a pension.

INTERLOCUTORY RULINGS.

JOHN W. MORRIS.

1. Upon an appeal to the Secretary of the Interior from an adverse interlocutory ruling of the Commissioner of Pensions pending the consideration of a claim by the Bureau of Pensions, the Department holds that such an appeal can not be entertained until the Bureau of Pensions has finally adjudicated the claim itself.
2. Appeals from the Bureau of Pensions to the Secretary of the Interior are governed by the same general rules as regulate the granting of appeals from any tribunal having original jurisdiction to a tribunal having appellate jurisdiction over the matters in controversy.

Assistant Secretary Hawkins to the Commissioner of Pensions, March 29, 1888.

The Department is in receipt of an appeal filed by John W. Morris attorney for Elijah Conner, late private, Company H, One hundred and thirtieth Illinois Volunteers, in his claim for increase of pension, Certificate No. 136508, said appeal having been taken from your action of August 16, 1887, and March 19, 1888, refusing to order another medical examination of claimant.

It appears from said appeal that claimant's application for increase was accompanied by several affidavits of physicians and neighbors, purporting to give the present physical condition of claimant, and which, in his opinion and that of his attorney, warranted the ordering of another medical examination.

After examination of said affidavits, the additional medical examination appears to have been refused, and from that action claimant, by his attorney, appeals, the claim for increase being still pending in your Bureau for final adjudication.

Appeals from the Bureau of Pensions to the Department of the Interior are governed by the same general rules which regulate the granting of appeals from any tribunal having the original adjudication of matters in controversy *to a tribunal* having appellate jurisdiction over said *matters for purposes of* revision. It is a fundamental and essential

rule, which has always been recognized and insisted upon by the Department, that there must be a final adjudication and determination of the whole matter by the tribunal having original jurisdiction, before an appeal will lie from its decision. So far as the Department is informed by this appeal, the application of claimant for increase of pension is still pending before your Bureau; and the refusal to grant an additional medical examination upon the ground of the new evidence filed by claimant is a mere interlocutory proceeding, arising in the course of the adjudication of said claim. The increase of pension asked for may or may not be granted irrespective of said refusal, and hence, until such final action is had by you, no appeal can be entertained.

Upon the final rejection of the claim for increase an appeal will be entertained, and the adjudication of said claim by the Bureau of Pensions reviewed, including the alleged refusal to grant an additional medical examination; but until such final determination of the claim the Department declines to consider an appeal from any interlocutory order or ruling made by you in the adjudication of said claim.

PRESUMPTIVE EVIDENCE.

CYPHERT P. GILLETT. (*Motion for reconsideration denied.*)

Upon a reconsideration of all the evidence supporting the claim of Cyphert P. Gillett, the Department adheres to and re-affirms the decision of the case as made September 17, 1887, and reported in volume 1, P. D., p. 270.

Assistant Secretary Hawkins to the Commissioner of Pensions, March 22, 1888.

Your letter, under date of January 12, 1888, containing a request for reconsideration of departmental decision of September 17, 1887, in the claim of Cyphert P. Gillett, No. 184024, together with a report and a brief of the testimony found in the case, received. (See vol. 1, P. D., p. 270.)

I have taken especial pains to carefully examine all the evidence both for and against the allowance of this claim, and, as stated in the original opinion, the conclusion arrived at then and now by the Department is not free from doubt. But I do believe that the testimony, all taken together, can as well be construed in favor of allowing the claim as against allowing it; and for fear that a great wrong might be done the soldier by a disallowance of his claim, I prefer that the error committed, if any, shall be in the soldier's favor rather than against him.

It is proper for me to add, that I have again submitted not only your report and brief of testimony, but also the testimony as originally briefed, together with the opinion rendered by the Department in this *case before mentioned*, to another and different board of pension ap*peals, with instructions* to carefully consider the same and give me the

benefit of their conclusions. They have reported to me that in their judgment no error was committed of either law or fact in the decision rendered by the Department, September 17, 1887, and that the same ought to be adhered to.

I desire to state further that, after this labor had been given to this case, I presented the matter to the Secretary of the Interior for his instructions in the premises, and I am directed by him to state that he is entirely satisfied with the conclusion reached in the original opinion rendered by the Department.

You will therefore please proceed to fix such ratings in this case as the law and the evidence shall warrant.

The papers are herewith again transmitted.

DISABILITY FROM INSANITY—RE-ISSUE AND RE-RATING.

ALBAN G. STABLER, FOR EDWARD CAMPBELL, ALIAS HENRY MULHOLLAND.

1. Where the alleged insanity of claimant is adjudged to have originated during his military service, to have existed also in a pensionable degree at the date of discharge, and to have continued in a pensionable degree from that date, the Department holds that claimant is included in the exception named in the proviso which section 2 of the act of March 3, 1879, contains—by virtue of which exception "insane persons and children under sixteen years of age" are excluded from the operation of the rule which requires applications for arrears of pension to be filed "prior to the 1st day of July, 1880."
2. The Department reaffirms the ruling whereby ratings which are allowed in conformity with medical recommendations, from time to time, are approved as describing the nature and covering the extent of claimant's disability.

Assistant Secretary Hawkins to the Commissioner of Pensions, April 24, 1888.

Herewith are returned the papers which accompanied your report of April 2, 1888, in the appeal claim of Alban G. Stabler, committee of Edward Campbell, alias Henry Mulholland (insane), late a private in Company A, Seventeenth United States Infantry, certificate No. 338937.

Soldier was pensioned October 9, 1886, at $18 per month from December 15, 1880, the date of filing his claim; at $24 from June 28, 1882, and at $30 per month from March 3, 1883, for disability from insanity.

Thereupon appellant, by his attorney, Frank Y. McDonald, filed a statement, alleging in substance that the soldier was insane at the time of his discharge from the service and that said disability has ever since continued, and claiming a re-issue and re-rating to allow pension from discharge at $31.25; from June 4, 1874, at $50; and from June 17, 1878, at $72 per month.

The case was subsequently specially examined with a view to determining, if possible, the soldier's mental condition from discharge.

After exhausting every available source of evidence, the claim for re-issue, etc., was rejected May 28, 1887, on the ground that "claimant has received the full amount of pension to which he is entitled under existing laws," and because the evidence showed the soldier had "had lucid intervals subsequent to discharge, within which he might have made a claim."

The guardian, by his attorney, appeals and contends, first, that the pension should have been allowed to commence from the date of soldier's discharge; and, secondly, that the rate allowed is insufficient. Other points are made by said attorney, but the questions involved are subordinate, and a determination of the two points of contention will settle the case.

The records of the War Department show that this soldier was enrolled July 18, 1870. He is reported on rolls August 31 and October 31, 1871, a private, present, sick in quarters at Green River Agency, Dak. (nature of sickness not stated). Having recovered from insanity, he was discharged from service at Washington, D. C., December 13, 1871, by order of the Secretary of War.

In a certificate dated at Green River Agency, Dak., November 12, 1871, Dr. E. J. Clark, acting assistant surgeon U. S. Army, stated:

* * *

The first time it was noticed that he (soldier) was insane was in July 1871. He was then at work with a detachment procuring logs for the construction of buildings at this post. * * * I first saw said Henry Mulholland in August, 1871; he was then in the hospital for treatment for dislocation of the right shoulder. While there he would often be up at night walking around the ward, muttering to himself and imagining some one was pursuing him. At times he appeared to be quite sane. There is considerable numbness of the right side of the body and other evidences of paralysis. I am satisfied that the said Henry Mulholland is insane, and that it was first observed in July last, about four months ago.

The report from the Government Hospital for the Insane, near Washington, D. C., dated December 13, 1871, states:

To-day two brothers of Private Mulholland, from Baltimore, have paid him a visit and expressed a desire to obtain his discharge from the hospital and from service, and to take him to their home in Baltimore. They represented that he was not altogether right in his mind at the time of his enlistment. * * *

It appears from the evidence in the case that, for several years prior to his enlistment, the soldier was in the employ of Hugh Sisson & Sons, marble workers, at Baltimore, Md., and on or about January 27, 1872, he again entered their employment and was put to work at the same kind of work that he was engaged in prior to enlistment. He continued in the employ of said Sisson & Sons from January 27, 1872, to August 9, 1873, during which he earned about $564. During each quarter of this period he lost some time, the fifth quarter 30 days, and during the sixth (and last) quarter 46½ days. The work upon which the *witness was employed* required no particular mechanical skill. Whether *the soldier was discharged* or quit his employers because he could no *longer work is not clearly* shown. There is some evidence that, while

in the employ of Sisson & Sons, soldier was not quite right in his mind and that he left the employment on account of his disease. For some time after quitting Sisson & Sons' employ, the soldier was moody, sat around, did no work, and talked but little with any one. Some time prior to 1878 he went with a nephew to California, to live with a brother on a cattle-ranch. He was gone to California some five or six months, when his brother brought him back in irons. He was then medically examined and, April 3, 1878, committed to the Maryland Hospital for the Insane. The records of that institution show that his mental disorder was chronic mania, and that he "eloped" from said hospital October 24, 1878, having during the time he was there only slightly improved in his mental condition. There is no medical evidence that the soldier ever recovered from the mental disorder from which he was suffering at the time he was committed to said hospital, nor that his mental condition was improved subsequent to the time he left that institution (October 24, 1878). At some time subsequent to his leaving the Maryland Hospital for the Insane, he appears to have gone to the Bayview Asylum and remained there some four or five weeks; and April 2, 1886, the soldier was, by order of the criminal court of Baltimore, committed to the Bayview Asylum for the Insane, where he appears to have since remained.

Louisa Brown, a neighbor, testified before Special Examiner W. J. Brooks that she has known the soldier since 1877 or 1878; that he has been simple ever since she first knew him. Witness never knew him to work for or with any one except James Finertz. In 1879, soldier went down the bay or river with Finertz, dredging for oysters. How long he was gone on that trip witness can not say. Before the same examiner, James Finertz (alias Gibson), testified that he became acquainted with the soldier in the winter months before Christmas of 1879. Witness sent him down the river on an oyster schooner. He was on the boat from ten to fourteen days doing all the work usually done by hands in such work; witness noticed nothing wrong with soldier, except that he complained of one of his shoulders; soldier received same pay as other hands. Witness and soldier went on another trip in 1880. They were on that trip about sixteen days; both did the same work and received the same pay, $8, for the time while on that trip; witness did not notice any unusual action or foolishness about the soldier. Witness thinks he went on these trips of his own free will. Since that time witness has known nothing of the soldier's condition. Except the foregoing, there is no evidence that the soldier has engaged in any work or employment since he left or was discharged from Sisson & Sons's marble works.

Soon after his discharge from the service, soldier went to live with one Dennis McSweeny, his brother-in-law, and, except when in California or in some asylum, he has ever since made his home with said McSweeny, *who watched and* cared for him up to the time appellant was *appointed a committee.* During the time soldier made his home with Mc-

Sweeny, he (the soldier), on two or more occasions, wandered (tramped) away and was for a time lost. On one of these occasions, after extensive inquiry and advertisement, McSweeny found soldier at the Soldier's Home near Washington, D. C. On another occasion, after an absence of several months, he returned with his clothing worn out, and said he had been to Canada.

On the 10th day of March, 1879, the said Dennis McSweeny went with, or took, the soldier to the office of an attorney, when a declaration for an invalid pension was prepared; from the attorney's office the parties went to the office of the clerk of the supreme court in and for the city of Baltimore, Md., when the declaration was properly executed on the same day; it was filed in the Pension Bureau, December 15, 1880. Appellant claims the declaration was left in the hands of the officer before whom it was executed, because the soldier or his brother-in-law did not have with them the necessary money to pay the clerk's fee, and that, while on the way from the clerk's office to McSweeny's home to procure money to pay the fees, the soldier slipped away from McSweeny and was absent for several months, during which time McSweeny was unable to learn soldier's whereabouts. In this, appellant's claim is supported by the evidence of McSweeny and of the attorney.

Pending the adjudication of the claim, based upon the declaration filed by the soldier, as aforesaid, this appellant was, on the 9th day of April, 1886, appointed by the circuit court in and for the city of Baltimore committee of said soldier. On the 17th day of April, 1886, he filed in the Pension Bureau a duly-certified copy of the record of his appointment as such committee, and an affidavit for the purpose of completing soldier's claim. And thereupon the claim was completed and pension granted as before stated.

Dr. John B. Boyle testified before Special Examiner W. J. Brooks that he had no personal acquaintance with the soldier prior to 1877 or 1878, at which time, he thinks, he examined the soldier at his sister's request, with a view to his admission to the insane asylum. Witness made no record of the case. Witness further testified that for some time before he examined soldier, he appeared to witness like an escaped lunatic. * * * "I never saw him violent; rather simple and idiotic." Witness never rendered soldier any treatment, nor heard that any other doctor treated him.

A number of neighbors have testified that soldier has acted in a manner that was "strange," "queer," "foolish," or "insane," ever since his return from the service. The Baltimore, Md., board of surgeons, in a certificate dated June 28, 1882, say:

> Applicant has an expression of absent-mindedness and demonstrates a weakness of intellect. Is accompanied by a relative who answers most of the questions for the board. He (Mulholland) exhibits general symptoms of insanity, but at present answers questions quite correctly. We believe him to be insane, with lucid intervals.

This board rated his disability at total, $8 per month. Another board *at the same place, in their* certificate dated August 18, 1886, say: "This

man has a vacant, stupid look, which indicates a mild degree of idiocy, * * *" and rated him three-eighths total for disability caused by semi-idiocy.

Pending this appeal, the case was referred for an opinion to the medical referee of your Bureau upon the medical questions involved. In response to such reference, that officer gave his opinion on a slip dated January 31, 1888, saying that—

> From a medical standpoint, this soldier has not been capable of attending to his own business affairs since April 3, 1878. The rating given soldier October 8, 1886, viz, third grade to June 28, 1882, and second grade thereafter, is considered a just compensation for all his disabilities.

The claim of appellant for a reissue, to allow his pension for disability from insanity to commence from the date of his discharge, December 13, 1871, was rejected by you upon the ground that he "has received the full amount of pension to which he is entitled under existing laws," and because "the evidence showed that the soldier had lucid intervals subsequent to discharge, when he might have made a claim." This action proceeds upon the theory that, because the appellant appears to have had intervals of more or less lucidity in his insanity since discharge, when he might be supposed to have had sufficient discretion to exercise his rights under the pension laws and to file his declaration for pension, prior to July 1, 1880, he was therefore excluded from the benefits of the exception in favor of insane persons, contained in section 2 of the act of March 3, 1879, and that his claim for arrears was barred by the limitation therein prescribed, his application for pension not having been filed with the Commissioner of Pensions prior to July 1, 1880.

Such a theory is, in the opinion of the Department, consistent neither with sound reason nor with the present action of your office in adjudicating this claim.

Section 2 of the act of March 3, 1879, provides that—

> All pensions which have been, or which may hereafter be granted, etc., * * * shall commence from the death or discharge of the person on whose account the claim has been or is hereafter granted, etc.

Said section contains also a proviso, prescribing a limitation upon said right to arrears of pension therein granted, as follows:

> *Provided*, The application for such pension has been or is hereafter filed with the Commissioner of Pensions prior to the first day of July, 1880, otherwise the pension shall commence from the date of filing the application; but the limitation herein prescribed shall not apply to claims by or in behalf of *insane* persons and children under sixteen years of age.

Persons suffering under the disability of insanity, and minors under sixteen years of age, are thus expressly excepted from the limitation prescribed by said act.

By your adjudication of the claim of appellant, and the grant of a pension *for the disability of insanity* from the date of his filing his application, *you have necessarily* adjudged and determined that his alleged

insanity originated during his military service, existed in a pensionable degree at the date of his discharge, and has continued in a pensionable degree to the present time. How, then, can the position be now maintained by you that he has been free from said disability at any time since discharge to such an extent as to exclude him from the benefits of the exception aforesaid?

The Department is clearly of the opinion that claimant is included within said exception, and that the limitation prescribed in said act has no application to him, nor to any other soldier who is entitled to receive a pension under said act based upon the disability of insanity; and, therefore, your action rejecting his claim for a re-issue and arrears from discharge was error, and is reversed. You are accordingly directed to grant appellant a re-issue, to permit his pension for the alleged disability to commence from the date of his discharge; but, if the evidence now on file is insufficient to furnish a proper basis upon which to rate claimant for said disability for the period anterior to the date of the commencement of the pension he is now receiving, you will please make the investigation that shall be necessary to procure the information required.

With regard to the claim of appellant for a re-rating of his pension for the time it has been allowed, upon the ground that it has not been and is not commensurate with the severity of his disability, the Department can discover no error in your action.

The ratings allowed appellant have been made in conformity with the medical recommendations from time to time, and are approved as fully covering the extent of appellant's disability shown to exist by the foregoing opinion of the medical referee. It is the long established rule of the Department that ratings so fixed will not be disturbed upon appeal. (See cases O'Grady, William L. D., 1. P. D., p. 222; Odwell, Jno. T., *id.*, p. 334.)

Your action of rejection, so far as appellant's claim for a re-rating of his present pension is concerned, is accordingly affirmed.

UNDERGOING PUNISHMENT LINE OF DUTY.

MARY COBURN, WIDOW OF THOMAS COBURN.

Where a soldier incurred disease while undergoing punishment for desertion under sentence of a court-martial, it is held that, by reason of the sentence, the soldier was not in line of duty in the sense that conveys a legal right to pension. A soldier can not be pensioned for disability contracted whilst under a penalty inflicted on account of his own wrong doing.

Assistant Secretary Hawkins to the Commissioner of Pensions, April 26, 1888.

Herewith are returned the papers which accompanied the report on *appeal in the case of* Mary Coburn, widow of Thomas Coburn, late

private in Company I, Twenty-second Kentucky Volunteers, and afterwards private in Company C, Seventh Kentucky Veteran Volunteers.

The soldier enlisted October 1, 1861, for three years. The muster-roll of the first-named company for November and December, 1862, has an entry opposite his name: "Deserted November 21, 1862, on Ohio River;" and the same entry is on that for January and February, 1863. His name was dropped to February, 1864; and for March and April, 1864, the roll is not on file.

The roll for May and June, 1864, reports the soldier present, and same for October 31, 1864; and the roll for November and December, 1864, is not on file. The roll dated January 20, 1865, reports him: "Private, transferred to the Seventh Kentucky Veteran Volunteers, to serve term imposed by general court-martial, to forfeit sixteen months' pay and allowance, and serve one year after present term of enlistment."

The roll of Company C, Seventh Kentucky Veteran Volunteers for November and December, 1864, reports him: "Private, present;" and the roll for January and February, 1865: "Died of small-pox at Baton Rouge, La., February 5, 1865."

The widow filed her declaration January 3, 1867, based upon soldier's death in service and line of duty. Her claim was rejected March 9, 1872, upon the ground that the soldier's fatal disease was contracted during the period when he was serving a sentence imposed by a court-martial.

From this rejection the appeal is taken.

(Charles W. Dorsey, No. 1733 I street, northwest, Washington, D. C., for appellant.)

The Acting Commissioner, in rejecting this claim, reports his reasons in full therefor, as follows:

It is submitted that a soldier while undergoing sentence of a court-martial is not in line of duty in such a sense as to give title to pension for disability from disease contracted or injury received while undergoing such sentence, and that such rule is conclusive of the appellant's rights in this case.

The facts as to the incurrence of the disease causing the soldier's death in the service, and as to the appellant being lawfully married to him, and his widow, appear to be admitted. The question decisive of her claim to pension is, was the soldier, at the time of his death, in such a position and surrounded by such circumstances as to be considered in the line of duty?

It appears that the soldier had deserted, and, upon returning to his command, was tried by a general court-martial for said crime, found guilty, and sentenced to forfeit sixteen months' pay and allowances, and to serve one year after his "present term of enlistment" had expired. It would be useless for the Department, and a mere waste of words, to argue that a portion of this sentence of the court-martial should be considered as *punishment* and a part not. This would be, in effect, to attempt to make a new sentence for the court. By said sentence the

court imposed upon the soldier, as a punishment for his crime, the forfeiture of both his pay and his allowances, and required the extra year's service after the expiration of his "term of enlistment." That the court had jurisdiction to impose this sentence is evident from the fact that it was approved and actually carried into effect. As to the wisdom, propriety, or good policy of such a sentence this Department has nothing to do; nor can such considerations in any way affect this claim. It is, in the view of the Department, entirely inconsistent with the idea of line of duty that the soldier was, at the time of the incurrence of the disease which caused his death, undergoing punishment as a convict for a departure from the line of duty; and it is immaterial, so far as the principle which governs this and all similar cases may be concerned, as to what was the character of the punishment inflicted by the court.

This is no new nor original ruling of the Department, but appears to be a position that was long since taken and has been consistently maintained by different administrations in such cases. For instance:

In the case of Joseph Reed, minors of, No. 222169, Chandler, Secretary, held, January 6, 1877, that "where a soldier's disability was contracted while confined in a military prison on a charge of desertion, he was not in line of duty, as the imprisonment was in consequence of his violation of the law."

In the case of Michael Kearns, No. 173284, Schurz, Secretary, held, December 5, 1879, that "a soldier is not in line of duty, as construed by the administration of the pension law, when absent from his command under sentence of a provost court."

Again, in the case of Sarah J. Barber, No. 213778, Teller, Secretary, held, September 29, 1882, that "a soldier who dies of disease contracted while undergoing imprisonment, in consequence of having violated military law, can not be regarded as having died of disease contracted in the line of duty, and his widow is not entitled to pension." This doctrine has been again announced in the recent case of Clarence Wallace (2 P. D. p. 41), wherein it is held that "where a soldier was arraigned, tried, and convicted by a court-martial for an offence against the Regulations of the Army, and, during the execution of the sentence, whilst in confinement, he contracts typhoid fever and resulting deafness, the resulting disabilities were not incurred in the line of duty. Claimant can not be pensioned for disabilities incurred whilst undergoing a penalty inflicted by reason of his own wrong."

In the case under consideration it is admitted as beyond dispute that the soldier's fatal disease was incurred during the time that he was serving in a command to which he had been transferred by reason of the sentence of a court-martial after the time of his original enlistment, which service was inflicted upon him by the sentence of said court-martial as a penalty for the crime of desertion. Under these circumstances, the Department is unable to distinguish in principle between the present case and those above quoted merely from the fact

that the character of the punishment inflicted by the court was different in this case from that inflicted in the former.

For the foregoing reasons the Department is clearly of the opinion that the death of the soldier did not result from disease contracted in the line of duty, and consequently your action rejecting this claim upon that ground is affirmed.

PERSONAL ASSAULT—LINE OF DUTY.

JESSE M. STILWELL.

A personal assault by one comrade upon another in the service is neither a legitimate nor a necessary incident of the line of duty; and the fact that claimant did not sustain a culpable relation to the assault does not strengthen, much less establish, his claim for pension on account of *injury* resulting from it. The question involved in such claim is not whether *claimant* was to *blame* for the act of his assailant, but whether the act itself was a necessary, or even a reasonable, incident of the service.

Assistant Secretary Hawkins to the Commissioner of Pensions, April 14, 1888.

I herewith return to you the papers in the appealed case of Jesse M. Stilwell, late of Company A, Seventh Ohio Volunteers, whose claim for invalid pension, No. 539480, was rejected by your office.

The basis of this claim is injury to back, which, claimant alleges, was incurred in the service and line of duty about December 24, 1863, when he was struck on the small of his back by a comrade, Joseph S. Carr, who, without provocation, assailed him with a hickory stick, which injury greatly disabled and still disables him. Claimant testifies that when attacked by Carr, who struck him with a stick of wood, he was sitting in front of his tent untying his shoes and preparing to go to bed. When he saw Carr coming towards him with a stick of wood drawn up to strike, he made an effort to get out of the way, but was hit, and fell to the ground. Claimant did not report his injury to the regimental surgeon for the reason, as he states, that he had re enlisted and would not be permitted to go home on veteran furlough.

The claim was rejected by your office on the ground that "the alleged injury to back was not received in the line of duty and not due to the service in contemplation of law, under ruling 133."

From this adverse action the appeal is taken.

OPINION.

The claimant in this appeal admits, and all the evidence in the accompanying papers goes to show, that the disability which he alleges as the basis of his claim was incurred as the result of an assault made upon him by *a comrade* in the service, the assault being neither a legitimate nor a necessary incident of the line of duty. The claimant in-

sists that the aforesaid assault was unprovoked and unexpected, and disclaims all responsibility for the same; but the fact that claimant did not sustain a culpable relation to the cause of his disability does not, by reason of the same, affect his title to pension. The question involved in the claim is not whether claimant was to *blame* for the conduct of his assailant, but whether the blow struck by the latter was a necessary or even a reasonable incident of line of duty in the service. The ruling of the Department in similar cases has been clear and emphatic, as illustrated in the adjudication of the appeals of William M. Ammerman (p. 5, vol. 1, P. D.) and William Jones (p. 87, vol. 1, P. D.), in the latter of which a soldier, who was leaning upon a banister, was pushed over and injured by two scuffling comrades, said injured soldier not being at the time in the performance of any military service or duty; and it was held that the injury was not received in the line of duty. This ruling is directly applicable to this appeal, and therefore I approve the action of your office in rejecting the claim for pension.

REGULAR AID AND ATTENDANCE.

JOHN COSTELLO.

Claimant having appealed for the rating of $50 per month, the Department holds that said rating is provided for those pensioners only who, because of permanent and total helplessness, require the regular aid and attendance of another person; and, in the absence of proof showing claimant to be in such condition, the appeal is denied.

Assistant Secretary Hawkins to the Commissioner of Pensions, April 12, 1888.

Herewith are returned the papers which accompanied your report of the 6th of April, 1888, upon the appeal of John Costello, who was a private in Company E of the Sixth Regiment of New York Heavy Artillery Volunteers, from the decision of your office rejecting his claim for increase of pension, cerficate No. 228108.

The said John Costello is pensioned on account of disability from loss of sight of right eye, impaired sight of left eye, left inguinal hernia, and injury of left hand. Since July 14, 1886, the pensioner has been in receipt of a pension of $30 per month, granted on the ground that he is disabled so as to be incapacitated for the performance of any manual labor.

On the 5th of July, 1887, Mr. Costello filed a declaration for increase of pension, in which he alleged that his disabilities rendered it necessary for him to have the regular aid and attendance of another person.

Under his application for *increase* of pension claimant was examined on the 16th of September, 1887, by the board of surgeons at Washington, D. C., consisting of Drs. J. O. Stanton, J. C. Rosse, and W. V. Marmion, the last named being a specialist in diseases of the eye. Vision of the right eye is lost; injury of the left eye is estimated at

fifteen-ninetieths. The board rated the disability from loss of sight at twelve-eighteenths, from double inguinal hernia at twelve-eighteenths, and from injury of left hand at three-fourths. They state in their certificate that the pensioner does not require an attendant.

The medical referee, having considered the certificate of the board, gives the opinion that the pensioner is not entitled to a higher rate of pension than $30 per month.

The rate of $50 per month, the next higher rate above $30 per month, applicable to this case, is provided for those pensioners only who require the regular aid and attendance of another person because of permanent and total helplessness. The evidence in this case does not show that the pensioner is in such a condition.

The action of your office refusing to allow a higher rate of pension than $30 per month is in accordance with the evidence, and is, therefore, approved.

ESTOPPEL SUCCESSIVE ENLISTMENTS.

JOHN H. MCLAUGHLIN.

A soldier's second enlistment in the Army raises the reasonable presumption that he had recovered from whatever disability he had incurred in his first service, and operates as an estoppel upon his claim for pension. If, at his second enlistment, he conceals any disability which he had contracted in his first service, public policy requires that he shall be estopped from denying the truthfulness of statements which he may have made to the recruiting officer to whom he offered himself for re enlistment.

Assistant Secretary Hawkins to the Commissioner of Pensions, April 13, 1888.

The papers in this case are returned herewith.

The records of the Navy Department show that appellant enlisted as a second-class fireman, July 8, 1864, and served on the *Virginia* from that date to August 20, 1864; on the *Fear Not*, from August 21, 1864, to February 5, 1865; on the *Ida*, from February 6, 1865, to April 14, 1865; and on the *Tallahatchie*, from April 15 to July 18, 1865, when he was discharged. The report from the Bureau of Medicine and Surgery shows he was admitted to hospital at New Orleans, April 17, 1865, with "contusions of head and neck." On April 12 the U. S. S. *Ida* was blown up by a torpedo. "Patient was standing on deck at the time, and was blown up several feet, and fell, striking on pieces of the wreck, receiving numerous contusions; doing well." He was returned to duty April 28, 1865. The record further shows that the *Ida* was sunk (or blown up and sunk) by a torpedo in Blakely River, April 13, 1865, and a number of her officers and crew were killed and wounded at that time. Appellant is named in the list of "slightly wounded" at that time and place.

The records of the War Department show that appellant enlisted and was mustered into service as private in Company B, Third United

States Infantry, November 14, 1865, and was discharged as sergeant November 14, 1868, by reason of expiration of term of service. He reenlisted in the same organization July 17, 1869. He was transferred to troop M, Sixth United States Cavalry, August 1, 1872. He was discharged July 17, 1874, by reason of expiration of term of service, a private. He re enlisted July 18, 1874, in Company F, Eighth United States Cavalry, and was discharged from service July 18, 1879, by reason of expiration of term of service. "He is reported for duty on all the rolls."

In a declaration filed March 23, 1882, appellant alleged that, while in the line of duty on board the U. S. S. *Ida*, during the engagement before Mobile, April 9, 1864 he was severely injured by the explosion of a torpedo. The injuries sustained affected him most in the spine and left shoulder. He also received at the same time many cuts in the face and head, one under the left eye, which has caused the loss of sight of that eye, so much so that 5 inches from a lamp or candle he could not say which was burning, and claimed a pension for disability from said injuries. In an affidavit filed May 1, 1886, he testified that, when the wound under his left eye healed, he found the sight of that eye was much affected. The disability from that time on gradually increased until the sight was wholly gone; that the explosion occurred and injuries were received while on board the U. S. S. *Ida*, and that, in addition to the other injuries named, he received a severe scald between the knee and instep.

This claim was rejected by your office February 14, 1884, on the ground that no pensionable degree of disability from causes alleged had existed since filing the claim.

The appellant subsequently filed additional testimony, all of which was duly considered; and the medical referee, having investigated and reported upon the medical questions involved, on December 6, 1887, the case was again rejected by your office upon the ground that "it is shown as a fact that he has not been disabled in a pensionable degree from causes alleged since date of filing claim. The loss of sight of left eye is not accepted as a result of the alleged injury."

From this adverse action of your office claimant filed an appeal March 21, 1888, the contention being that all his disabilities, as set forth by him, are the result of injuries alleged to have been received by him at the time he was blown up in the U. S. S. *Ida*, and that the disabilities do exist, and have existed from alleged causes ever since filing the claim.

The case now comes before the Department on this appeal.

OPINION.

In determining the merits of this claim the details of the circum*stances of the incurrence* of the alleged injuries, or of the character of *the injuries themselves*, are immaterial, solely from the fact that the

appellant is estopped from claiming pension for any injuries received in his first service by reason of the fact that, shortly after the alleged injuries were said to have been received, he re-entered the service of the United States and served not only one but three consecutive enlistments, covering a period of about fourteen years. The following is an analysis of the appellant's services in the Navy and, subsequently, in the Army of the United States:

Having enlisted in the Navy July 8, 1864, on April 12, 1865, the war vessel on which he was serving was blown up; the appellent was injured and at once sent to hospital, where he remained sixteen days, and was returned to duty at the expiration of that period, viz, April 18, 1865. He then did duty about three months, and at the expiration of that time, July 18, 1865, was discharged the service. On November 14, 1865, four months after discharge, he enlisted in the Third United States Infantry for three years, rendered the service, and was discharged. After six months' delay he re-enlisted in the same regiment for five years, was transferred to the Sixth United States Cavalry, and served out his term. The next day he again enlisted in the regular Army, this time in the Eighth United States Cavalry, and served another five years, when he was discharged July 18, 1879, by reason of expiration of term of enlistment, having (since he was blown up in the Navy in 1865 and spent sixteen days in hospital), served continuously in the United States Army some fourteen years, except about six months between two enlistments. The records of the Adjutant-General's office show that, during all this long period of service, mostly in the cavalry in the far West, he is reported "for duty on all the rolls." Comment as to his health during this period is unnecessary.

It is notorious that the recruiting officers of the regular Army, especially in time of peace, enlist able-bodied men only. In fact, they are forbidden to do otherwise; and it is made their duty not only to see to this, but to certify upon each recruit's enlistment paper that he is "duly qualified to perform the duties of an able-bodied soldier." With the record is an official copy of the certificate of the recruiting officer who first enlisted this man in the Third Infantry, in November, 1865, that such at the time was the status of appellant.

Had the appellant at the time of his enlistment been suffering from any bodily defect, especially such as he attributes to the explosion in Mobile Bay in 1865, he would not have been accepted as a recruit. And had he at any time, during either that or his two subsequent enlistments, developed any disability of sufficient gravity to have been pensionable, no matter from what cause, it would have resulted in his discharge upon a surgeon's certificate of disability.

It has been held by the Department in a number of cases that a second enlistment raises the reasonable presumption that the claimant had recovered *from* any disability he may have incurred in his first *service. When he offers* himself to the Government for enlistment he

says, in effect, "I am a sound man and able to perform the duties of a soldier." If he conceals any disability he perpetrates a fraud upon the Government, and public policy requires that he shall be estopped from denying the truthfulness of statements he may have made to the recruiting officer when he offered himself for enlistment.

And, again, having incurred injuries in his *first* service, claimant may be of the honest opinion, when he offers himself as a recruit, that he has fully recovered, so that his second enlistment is stripped of fraudulent attributes, and yet, notwithstanding this fact, latent disabilities may subsequently present themselves, being due to the original injury or disease. But if the record of the *second* service shows no treatment for the alleged disability incurred in the first service, or if, as in this case, it shows that during all of the second service the soldier is officially "reported for duty on all the rolls," then, he is estopped from making claim for pension for first service disabilities. In other words, the second enlistment raises the presumption that, "if any disability had been contracted in the first service, the appellant had recovered from it when he presented himself for enlistment a second time," and that a subsequent record of active service, coupled with the fact that he was always ready for duty, effectually bars him from right to pension.

This man's second, third, and fourth service was, in itself, commendable, but the very fact of his being able to render it for fourteen years, without the recurrence of any old disability, evidently bars him from setting up the claim he has presented.

The action of your office is affirmed.

EVIDENCE OF ORIGIN.

ARAD P. BROWN.

1. The Department re-affirms the rule that "lay testimony, when unsupported by the record or by direct medical evidence, and which is dated years after claimant's discharge, can not be accepted as proof of the incurrence of the alleged disability in the service."
2. The Department holds that, where there is a hospital record in the service, such record raises the presumption that it contains all the diseases and all the treatment which the soldier had during his army service; and that presumption will be maintained until the contrary be clearly established by competent evidence.

Assistant Secretary Hawkins to the Commissioner of Pensions, April 9, 1888.

Herewith are returned the papers which accompanied your report of March 30, 1888, upon the appeal of Arad P. Brown, late private, Company D, Twenty-third Maine Volunteers, from your action rejecting his claim for restoration and increase of pension.

Claimant enlisted September 10, 1862, and was discharged from the *service May 2, 1863,* upon a surgeon's certificate of disability for "tuber-

culosis, following measles." He filed his original declaration for pension May 14, 1863, alleging, as the basis of his claim, disability from "tuberculosis," following and the result of an attack of measles, contracted in the service and line of duty, as set forth in the certificate of disability upon which he was discharged. He was pensioned for said disability September 19, 1863, at $8 per month, from May 2, 1863. His pension was subsequently reduced to $5.33⅓ per month from September 4, 1864, and to $4 per month from March 4, 1879, at which date he was dropped from the pension rolls, for the reason that his pensioned disability was shown to have ceased by the certificate of medical examination of that date.

On March 29, 1879, claimant filed the present application, praying to be restored to the rolls on account of said disability, and also alleging as a new disability, for which he asks an increase of pension, sciatic rheumatism, as a result of cold and exposure in the service while convalescing from the attack of measles contracted in the service as aforesaid.

The records of the War Department furnish no evidence whatever of the existence of or treatment for said disability of rheumatism in the service, nor at discharge.

Since the date of filing said declaration for restoration and increase, the claimant has been medically examined at Norway, Me., May 29, 1879, by a single surgeon, who rates him one-half for disability, caused by sciatic rheumatism; by single surgeon at Auburn, Me., February 27, 1880, who rates him "total" ($8) for disease of lungs, and declines to rate for sciatic rheumatism; by board of surgeons at same place, April 19, 1882, who rate him one-half for disease of lungs, and decline to rate for rheumatism; by board of surgeons at Portland, Me., April 4, 1883, who report "there is nothing to rate on, except his statements," as to either of the disabilities alleged, and decline to rate him for either.

After having been subjected to a special examination in the field, the claim was rejected July 30, 1883, on the medical ground that no disease of lungs was shown to exist since date of dropping; and claim for rheumatism, on the ground that it was not shown to be due to claimant's army service.

From said action of rejection the claimant filed on appeal March 6, 1888, contending that the action of rejection was not just, and that the evidence on file fully warranted his restoration to the pension-roll.

Subsequent to said appeal, the papers in the case appear to have been referred by you, March 16, 1888, to the present medical referee of your Bureau for consideration and for his opinion as to whether or not the medical action of June 30, 1883, should be adhered to, and whether claimant is entitled to restoration for disease of lungs, in view of certificate of medical examination, dated December 6, 1882. On March 19, 1888, the medical referee replied to said reference with the opinion that "*the medical action of June 30, 1883* (rejection of rheumatism as due

to rubeola), should be adhered to. From the certificate of medical examination of December 6, 1882, it appears that claimant was entitled to restoration for disease of lungs."

OPINION.

It appearing from your report hereon that the claim of appellant for restoration of pension, formerly granted him for disease of lungs—the result of measles—has been reconsidered by your office in view of the recent action of the medical referee thereon, as set forth in his opinion quoted in the foregoing statement of facts, and that, upon the return of the papers to you, the proper action will be taken looking to a restoration of appellant to the pension-roll for said disability, no further consideration or discussion of that part of this claim will be had here.

The sole remaining question to be determined upon the appeal is as to the correctness of your action rejecting his claim for increase of pension on account of the disability of rheumatism, to which you still adhere.

The claim of appellant for increase upon the basis of said disability is untenable for several reasons.

In the first place, appellant alleges that said sciatic rheumatism is the result of the measles contracted in the service.

Upon the rejection of this claim by your office in June, 1883, the then acting medical referee declines, in his opinion upon the claim, to accept said sciatic rheumatism as a pathological sequence or result of measles, or of convalescence therefrom; and said opinion is confirmed by the recent action of the present medical referee upon the subject. This is purely and emphatically a medical question in which it is the general rule of the Department, established by a long line of decisions, to accept the opinion of the medical referee as final and conclusive.

In the second place, the appellant endeavors to establish the origin and existence in the service of the alleged rheumatism by the vague and uncertain testimony of comrades alone, given many years afterwards. The records of the War Department furnish no evidence either corroborating the testimony of said comrades or showing the existence of the alleged disease in the service; and appellant admits his inability to produce any medical testimony showing treatment therefor during his service.

Such testimony, unsupported by the record or by medical evidence, is, as the Department has decided in a number of cases, not sufficient to establish origin in the service. In the case of McIntire (1 P. D., p. 20) it was held:

> Lay testimony, when unsupported by the record or by direct medical evidence, and which is dated years after claimant's discharge, can not be accepted as proof of the incurrence of the alleged disability in the service.

See also to the same effect, the cases of Dodge, John W. (1 P. D., *p. 211.), Fallada,* Franz (*id.*, p. 273).

In the third place, the records of the War Department show the existence of, and hospital treatment for, the diseases of measles and resulting tuberculosis, but make no mention of the alleged rheumatism. The Department has frequently held that such a record raises the presumption that it contains all the diseases and all the treatment which appellant had during his army service, and that he was not treated for any disease other than that stated; and this presumption will obtain until the contrary is clearly and satisfactorily established by competent evidence. See case of Luther, Ellis (1 P. D., p. 387), and decisions on this point therein cited.

Further; this appellant was discharged upon a certificate of disability given by the Medical Inspecter-General of the Army at Washington, which recites that he is incapable of performing the duties of a soldier because of "tuberculosis following measles," but makes no mention of the alleged disability from sciatic rheumatism. In the case of Wescott, Alonzo F. (1 P. D., p. 316), the Department emphatically states that the recitals in such a certificate fully establish that the disability for which appellant was discharged from the service was that therein mentioned, and that it contained a description of all the disabilities with which he was suffering at the time.

For the foregoing reasons the Department is clearly of the opinion that your action rejecting this claim for increase of pension on account of said alleged rheumatism, upon the grounds stated by you, was proper, and it is hereby affirmed. The papers in the claim are returned for further adjudication of the claim for restoration, as requested by you.

SECOND AND THIRD ENLISTMENTS.

DAVID G. RUMMEL.

A second enlistment raises the presumption that, if any disability had been contracted in the first service, the claimant had recovered from it; and this presumption will stand until clearly disproved.

A third enlistment and service raise the presumption that no pensionable degree of disability was incurred in the soldier's second service; and this presumption is made conclusive by the absence of testimony showing such a degree of disability at discharge or thereafter, and by the certificate of the medical examination of the soldier showing no disability at that date, from the cause alleged.

Assistant Secretary Hawkins to the Commissioner of Pensions, March 27, 1888.

Herewith are returned the papers which accompanied your report of March 21, 1888, upon the appeal of David G. Rummel, late private, Company E, Fifteenth United States Infantry, from your action rejecting his claim for invalid pension.

Claimant filed his declaration for pension June 23, 1880, alleging as the basis of his claim that, while in the line of duty at Franklin, Tenn.,

about the month of April, 1862, he, from severe exposure, contracted lumbago, which subsequently became chronic.

The records of the War Department show that claimant was first enrolled April 22, 1861, a private in Company K, Fifteenth Ohio Volunteers, for the term of three months, and that he was mustered out with his organization August 27, 1861. He was again enrolled October 16, 1861, in Company E, Fifteenth United States Infantry, to serve three years. Reported on rolls of that organization April 30, 1862, to June 30, 1862, "on detached service with the wounded of the company." He was discharged from the service July 24, 1862, upon a certificate of disability in which the surgeon, D. W. Flora, stated that he found claimant incapable of performing the duties of a soldier because of "injury of the spinal cord in lumbar region, caused by a tree falling on him. There is loss of motion and sensation in the lower extremities, with some dysuria. The injury was received previous to enlistment."

Claimant was enrolled for the the third time June 10, 1864, as a private-substitute—in Company K, One hundred and tenth Ohio Volunteers. He is reported on rolls of said organization, present, to July 9, 1864, when he was taken prisoner in action at Monocacy Bridge, Md.; confined prisoner of war at Richmond, Va., to February 20, 1865; paroled and sent to Camp Parole, Md., February 22, 1865; mustered out on individual muster-out roll June 5, 1865. Records furnish no evidence of the alleged disease or disability, except that found in the surgeon's certificate aforesaid.

Claimant was medically examined by the board of surgeons at Columbus, Ohio, September 21, 1881, who certify that "he is in good general condition and has no lumbago now," and they refuse to rate him therefor.

After having been subjected to a searching special examination in the field, the claim was rejected by your Bureau, April 9, 1886, upon the ground that "the record shows that the disability existed prior to enlistment, and special examination fails to show origin in the service; and for the further reason that no disability is found on medical examination."

From said action of rejection claimant appealed March 1, 1888, contending that the evidence filed in support of his claim should be accepted as sufficient to rebut the adverse statements of the certificate upon which he was discharged, and to establish prior soundness.

OPINION.

Appellant appears to have had three terms of military service. The first, as a private in Company K, Fifteenth Ohio Volunteers, was for only three months, and he was discharged therefrom at the expiration of his term, August 27, 1861. Shortly thereafter he enlisted a second time for three years as a private in Company E, Fifteenth United States *Regular Infantry*, and it is during this second service that he alleges

the incurrence of the disability for which he claims pension, and from which he was discharged upon a surgeon's certificate of disability July 24, 1862. He enlisted for the third time, June 10, 1864, in Company K, One hundred and tenth Ohio Volunteers, as a substitute, and served until the close of the war, and was mustered out of the service upon individual roll, June 5, 1865.

The material averments of the certificate of disability upon which the appellant was discharged from his second service are quoted at length in the foregoing statement of facts, and are strongly adverse to the validity of the claim of appellant. It is therein distinctly and positively stated by the surgeon who examined the appellant at the time, and who made a contemporaneous record, that the disability of back, in lumbar region, was caused by a tree falling upon appellant, but that said injury was received prior to his enlistment.

This statement is vehemently denied by appellant, and he has filed in rebuttal of it the affidavits of two neighbors, who testify, very briefly and unsatisfactorily, that they were acquainted with appellant some years prior to his enlistment, that he appeared to be an able-bodied man, and that he had never been disabled by an accident, so far as they knew.

The Department has, in various decisions, invariably held that "the statements contained in the certificate of disability, upon which the soldier was discharged from the service, shall be taken as fully establishing the facts therein stated, unless fraud or mistake be apparent from the face of the certificate itself, or clearly established by the most positive and conclusive evidence." See case Luther, Ellis (1 P. D., p. 387), and similar cases therein cited.

It is evident at a glance that the afore-mentioned testimony, relied upon by appellant to rebut the statements of said certificate, can not be accepted as sufficient for that purpose under the rule above cited, and that said certificate "fully establishes" the origin of the disability, for which pension is claimed, to have been prior to appellant's enlistment, and is fatal to his claim.

There are other objections to the claim of appellant which would require its rejection if the statements of said certificate of disability be disregarded altogether and his statements with regard to his prior soundness be accepted as true. Except said certificate, there is no record and no medical evidence showing treatment for the alleged disability during his term of service; and in its absence the testimony furnished by appellant and obtained upon special examination is wholly insufficient to prove incurrence in the service and line of duty, of the alleged disease or disability.

Again, appellant's third enlistment and service raise the presumption that no pensionable degree of disability was incurred in his second service, which presumption is rendered conclusive by the absence of any *testimony showing such* a degree of disability at discharge, or there-

after, and by the certificate of the medical examination of appellant, in 1881, showing *no disability* from the alleged cause at that date.

The Department has held in a number of cases that "a *second* enlistment raises the presumption that, if any disability had been contracted in the first service, the claimant had recovered from it, and this presumption will stand until clearly disproved." (See cases of Taylor, John T., 1 P. D., p. 281; Gemberling, George W., *id.*, p. 213; Taylor, Wesley W., *id.*, p. 359.)

For the reasons herein given, the Department is clearly of the opinion that your action rejecting this claim, upon the grounds stated by you, was proper, and it is therefore affirmed.

LEGAL DISABILITIES OF PENSIONERS.

(INTERPRETATION OF SECTION 4766, REVISED STATUTES, AS AMENDED IN 1882, 22 STATS, 373.)

1. The domestic status of citizens and inhabitants of the several States is not committed to the Federal Government, but is the subject, exclusively, of State law and of the judicial administration of State courts. Legal disabilities are, therefore, such as are declared by or in pursuance of State law.
2. The decree of the court, establishing the legal disabilities of the pensioner and appointing a conservator of his person and property, in no manner assumes to direct the disposal of his pension, nor to seize it to his own deprivation. No State court possesses such power. It is by virtue of the statute of the United States only that, when the condition of legal disability is established and a guardian appointed by the State court, the pension may be paid to such guardian; but payment of pension to the guardian in that case is no more in obedience to process of law *when the disability results from habitual drunkenness*, the infirmity of age, or from other cause provided by law, than when it is adjudged for insanity, for imprisonment, for crime, or for minority.

Secretary Vilas to the Commissioner of Pensions, April 28, 1888.

Referring to your verbal request for a personal consideration of the opinion of the Assistant Attorney-General, under date of the 16th instant, and of the letter of Assistant Secretary Hawkins thereon, under date of April 18, in respect to the payment of pensions to the guardians of pensioners under other legal disabilities than such as arise from minority, or insanity, or the imprisonment of the pensioner, I beg to say that I have carefully reviewed the statutes, and the several documents submitted to me by you, exhibiting the ruling heretofore made in your bureau, and the argument presented in support of it.

The question seems to me to turn upon the proper interpretation of section 4766 of the Revised Statutes, as amended in 1882 (22 Stats., 373). I quote that section as so amended:

Hereafter no pension shall be paid to any person other than the pensioner entitled *thereto, nor otherwise* than according to the provisions of this title; and no warrant, *power of attorney*, or other paper executed or purporting to be executed by any pen-

sioner to any attorney, claim agent, broker, or other person shall be recognized by any agent for the payment of pensions, nor shall any pension be paid thereon; but the payment to persons laboring under legal disabilities may be made to the guardians of such persons in the manner herein prescribed; and pensions payable to persons in foreign countries may be made according to the provisions of existing laws; *Provided*, That in case of an insane invalid pensioner having no guardian, but having a wife or children dependent upon him (the wife being a woman of good character), the Commissioner of Pensions is hereby authorized, in his discretion, to cause the pension to be paid to the wife, upon her properly executed voucher, or, in case there is no wife, to the guardian of the children, upon the properly executed voucher of such guardian; and in like manner to cause the pension of invalid pensioners who are or may hereafter be imprisoned as punishment for offenses against the laws to be paid while so imprisoned to their wives or the guardians of their children. And pensions to Indian pensioners residing in the Indian Territory may be paid in person by the pension agent upon a suitable voucher, at some convenient point in said Territory, which, together with the form and manner of identification of the pensioners, may be prescribed by the Secretary of the Interior; such payments to be made in standard silver, at least once in each current year. And payments in person shall be made to the pensioner in cash, by the pension agent whenever, in the discretion of the Commissioner of Pensions, such personal payment shall be by him deemed necessary or proper to secure to the pensioner his rights; and the necessary and actual expenses of such pension agent in making such payments shall be paid by the Secretary of the Interior upon properly executed vouchers, out of the contingent fund appropriated for the use of the Pension Office. The Commissioner of Pensions may, when in his judgment it shall be deemed necessary or proper, visit in person for the purpose of examination and inspection, or may send any one or more of the officers of his Bureau for that purpose, any of the pension agencies or medical examining boards or surgeons; and the necessary and actual expenses for such visits shall be paid by the Secretary of the Interior upon properly executed vouchers, out of the contingent fund of said Bureau.

The mandate of this statute is payment to the pensioner, prohibiting absolutely any voluntary transfer in any form, as section 4747 prevents any compulsory alienation by attachment, levy, or seizure under any process of the courts, legal or equitable. To this, however, the statute adds, not as an exception to the rule, but, rather, as a modified application of it to accomplished its object:

But the payment to persons laboring under legal disabilities may be made to the guardian of such persons in the manner herein prescribed.

Whether the word "may" should in this statute be construed as *must* in all cases, it is not necessary to determine, because, considering it to give only a permissive authority, the providence of the Pension Office to secure the best interests of the pensioner would avail itself of the authority, unless there were very strong reasons to prevent, in a particular case; and I note with gratification the expressions in your letter to the Hon. F. M. Cockrell, of the United States Senate, in which your argument is most fully presented to the effect that your interpretation of the law is not in accordance with your judgment of what it should be, and that you would be glad to believe you possess the power to pay the pension of a habitual drunkard to his guardian rather than to himself—expressions entirely in accord with that watchful and sympathetic care for the welfare of the old soldiers of the nation, in other respects so often manifested under your administration of the office.

I understand your view to be that the phrase quoted, "persons laboring under legal disabilities," must be limited to persons under such legal disabilities as are indicated in the statutes of the United States; of which classes of persons you find two, namely, insane pensioners, and pensioners suffering imprisonment for offenses against the laws, indicated in the proviso to the section under consideration, and minors elsewhere indicated. I find myself unable to concur with you in this limitation.

The domestic *status* of cititens and inhabitants of the several States is not committed to the Federal Government by the Constitution, but is the subject entirely and exclusively of State law and of the judicial administration of State courts. Legal disabilities are, therefore, such as are declared by, or in pursuance of, State law; and, while it is undeniable that Congress might provide for the payment of pensions to whomsoever it should see fit, yet, when it devised a phrase of this character, I think it ought to be taken to mean a reference to the rightful power of determination of the citizen's *status*. I can not but think that the provision for the payment to the wife, or, if there be none, to the guardian of the children, of an "insane invalid pensioner having no guardian," or "of invalid pensioners * * * imprisoned as punishment for offenses against the laws," to have been made simply to provide for cases where the pensioner was not under guardianship, and not to have been designed to indicate the only persons, besides minors, who could be regarded as under legal disabilities, and susceptible of being put under guardianship. The fact of insanity, as well as of imprisonment, may have been considered as safely to be established without a judicial determination; while the personal incompetency which results from bad habits, from old age and the supervening physical infirmities, ought to require, in order to deprive the citizen of the personal government of his own affairs, a judicial ascertainment.

Besides, if it had been the purpose of Congress to limit the cases in which pensioners could be under guardianship to those mentioned in the proviso and in the statute on children's pensions—and there mentioned rather incidentally than definitively—that purpose would, it seems, have been expressed much more clearly, and no risk would have been left of another practice by employing the term "legal disabilities," the significance of which must be ascertained by the courts to which the Constitution awards the determination of the citizen's status.

I am of the opinion, which you express, that the wider interpretation of the statute is in the interest of the pensioner, and will result in the conservation of the bounty of the Government for his greater benefit in all those cases where, for any reason provided by the laws of the State in which he is a citizen, he has become unfitted prudently to *govern* his own affairs; and it seems to me, also, to be demanded by *that rule which directs* the interpretation of a remedial statute to be *liberal, to further the* ends for which it was designed, although in this

instance I unhesitatingly conclude that it is within the fair meaning of the terms employed.

I find it suggested in your letter, above referred to, that, to pay any such pension to the guardian appointed by State authority, is to render it in obedience to "process of law." To this it appears to me a sufficient answer to say, that the decree of the court establishing the legal disability of the pensioner and appointing a conservator of his person and property in no manner assumes to direct the disposal of his pension, nor to seize it to his own deprivation.

It is admitted that no State court possesses any such power. It is by virtue of the statute of the United States only that, when the condition of legal disability is established and a guardian appointed by the State court, the pension may be paid to such guardian; and payment of the pension to the guardian in that case is no more in obedience to process of law, when the disability results from habitual drunkenness, the infirmity of age, or from other cause provided by law, than when it is adjudged for insanity, for imprisonment, for crime, or for minority.

For these reasons, I am compelled to the conclusion that the statute affords warrant and, unless in a particular case there be sufficient reason for other action, imposes the general duty to make avail of the benevolent guardianship of the state courts over all pensioners under legal disabilities to secure to their best use the provision of the Government for their benefit; and that, for the interest of such pensioners, you are entirely warranted in pursuing that course for which you express the preference of your judgment.

The papers are herewith returned.

TOTAL DISABILITY—SECOND GRADE.

JOHN R. WEDDLE.

1. There being no intermediate rating provided by the act of August 4, 1886, it is held that said act virtually repealed or extinguished the rate of $24 per month for total disability, as described by the act of March 3, 1883, and thereby the third-grade rating, under the latter act, became the second-grade by operation of the act of August 4, 1886.

2. The Department construes and applies, as bearing upon this point, the following provision of the act of August 4, 1886, viz: "That from and after the passage of this act all persons on the pension rolls and all persons hereafter granted a pension, who, while in the military or naval service of the United States and in the line of duty, shall have lost one hand, or one foot, or been totally disabled in the same, shall receive a pension of $30 a month."

Assistant Secretary Hawkins to the Commissioner of Pensions, April 5, 1888.

Herewith are returned the papers which accompanied the appeal of *John R. Weddle, late of* Company C, Thirteenth Missouri Cavalry, from

the adverse action of your office rejecting his claim for increase or re-rating of his pension, certificate No. 69352.

It appears from the accompanying papers that claimant's original application was filed April 18, 1866, based upon gunshot wound of the left hand; and for said disability he was pensioned at $8 per month, and subsequently increased to $12 from July 2, 1873, to $16 from August 9, 1880, and to $24 per month from October 31, 1883.

September 27, 1887, claimant filed an application for increase, based upon his original disability; but, November 30, 1887, this claim was rejected on the ground that claimant was receiving the full rate to which he was entitled under the law—from which action this appeal was taken.

OPINION.

This appeal grows out of the action of the Commissioner of Pensions in refusing to grant claimant an increase of pension from $24 per month, as provided by the act of Congress of March 3, 1883, to $30 per month as provided by the act of Congress, approved August 4, 1886.

While the several ratings of the claimant, from the date when his name was first put on the pension roll to October 31, 1863, when he was granted $24 per month, under the act of March 3, 1883, were based upon medical grounds which had been ascertained by medical examinations, yet, the question involved in this appeal for an increased rating is chiefly legal, and must be determined in the light of the relative bearing of the acts of March 3, 1883, and August 4, 1886, one upon the other.

In view of the facts in the accompanying papers and of the acts of Congress aforesaid, I respectfully dissent from the action of your office in rejecting the pending claim, and sustain the appeal, for the reasons which follow:

(1) It appears that, December 12, 1883, guided by the medical evidence contained in the papers going to show the increase of claimant's disability from gunshot wound of left hand, claimant was granted $24 per month (third grade), under the provision of the act approved March 3, 1883, and in pursuance of the opinion of Medical Referee Hood, in the following terms:

> Resulting in total disability, such as to render incapacity to perform manual labor equivalent to the loss of a hand, or a foot; third grade from October 31, 1883.

There appears to be no disposition nor intention on the part of the Commissioner to question the correctness of Referee Hood's rating, nor is there apparent any evidence in the accompanying papers tending to disprove the accuracy of it; but, on the contrary, there is ample testimony to justify and sustain it.

(2) If the rating ($24 per month) which, in conformity with the opinion of the medical referee, was granted claimant from October 31, 1883, under the act approved March 3, 1883, was lawful and correct, then, it would seem to follow necessarily that, by operation of the act of Con-

gress, approved August 4, 1886, claimant would be entitled to $30 per month for the same disability, unless the condition of claimant had meantime undergone a material change for the better, in which case a re-rating would reduce his pension from $24 to less than $18 per month, inasmuch as the act of August 4, 1886, virtually repealed or extinguished the rating of $24 per month in such cases. The language of the act of August 4, 1886, bearing upon this point, is as follows, viz:

That from and after the passage of this act all persons on the pension-rolls, and all persons hereafter granted a pension, who, while in military or naval service of the United States, and in line of duty, shall have lost one hand, or one foot, or been totally disabled in the same, shall receive a pension of $30 a month.

In view of the explicit opinion of the medical referee, December 12, 1883, whereby claimant was rated at $24 per month for "gunshot wound of left hand, resulting in total disability, such as to render incapacity to perform manual labor equivalent to the loss of a hand or a foot," the foregoing language of the act of August 4, 1886, seems to be mandatory. There can be no escape from the necessary operation of it, and, inasmuch as at the date of its passage and approval claimant was on the pension-roll at $24 per month for total disability of left hand, he became by virtue of said act entitled, for the same disability, to $30 per month, there being no intermediate rating provided by the law. The third grade rating under the act of March 3, 1883, became the second grade under and by operation of the act of August 4, 1886.

(3) The examinations made of claimant in pursuance of specific instructions conveyed by your office to the board of surgeons at Bethany, Mo., November 9, 1887, and at Maryville, Mo., February 8, 1888, agree in rating claimant's disability at second grade, or $30 per month, as provided by the act of August 4, 1886; and the detailed reports of the examinations made by the aforesaid boards of surgeons—separated as they are in both time and place—give emphasis to the degree of disability which is recognized in claimant's left hand. But the present medical referee of your office, in the expression of his opinion, March 19, 1888, draws from the report of the latter examination the inference that "claimant is not totally disabled in left hand," and, therefore, "is not entitled to increase under act of August 4, 1886," because said report (February 8, 1888) states, as the medical referee says, that claimant's "hand is nearly useless; can hold small, light objects between thumb and forefinger." I perceive in the foregoing words, quoted by the present medical referee from the aforementioned report, no warrant for reducing claimant's rating below $24, inasmuch as the qualifying phrase is apparently insignificant; yet it is clear that, if that phrase be of any serious effect, such a reduction must follow under the law. But the aforecited qualifying phrase, instead of being construed as showing that claimant was "*not* totally disabled in left hand," may be accepted as indicating the contrary. It shows that claimant's disability was so *great, or so complete, at* the date of the examination, that he was able *only to "hold small, light* objects between thumb and forefinger"—a de-

gree of ability that, for all practical purposes, was equivalent to "useless." In other words, the ability to hold a small, light object between the thumb and the forefinger was not of sufficient degree to remove the aforesaid disability of left hand from that legal classification which, for pensionable purposes, is described by the act of August 4, 1886, as "totally disabled in the same." I respectfully dissent, therefore, from the opinion of the present medical referee on this point, not only because of its apparent inaccuracy in determining the significance of the aforesaid report of the medical board at Maryville, Mo., but because, if maintained, it would necessitate, under the law, a radical change in the rating as fixed December 12, 1883, by the former medical referee.

But the facts in this case, and the law applicable thereto, are too plain for disputation or for doubt. I therefore I sustain this appeal, and respectfully direct that claimant's disability be rated in conformity with the requirement of the act approved August 4, 1886, whereby claimant is entitled to receive $30 per month from the date of the act itself.

WIDOW'S REMARRIAGE—ACT OF MARCH 9, 1878.

ELLEN MORRISON, WIDOW OF DANIEL MILLIKEN.

1. The law of March 9, 1878, whereby the widow of a soldier who served fourteen days in the war of 1812 is entitled to a pension on account of her deceased husband, can not be construed to act restrospectively; and, therefore, the inhibition contained in section 2 of said law does not include nor affect the cases wherein the widows of soldiers of the war of 1812 had remarried, but whose second marriage had been dissolved by either death or divorce, prior to the passage of the law. The law can not be properly construed to act retrospectively, unless the intent of Congress that it should have such effect be clearly and conclusively enunciated.
2. The purpose of the act of March 9, 1878, was to create for widows a new claim to pension, on account of the service of their husbands in a certain war, but which claim should go into operation only after the passage and approval of the act itself.

Assistant Secretary Hawkins to the Commissioner of Pensions, April 26, 1888.

Herewith are returned the papers which accompanied the appeal of Ellen Morrison, widow of Daniel Milliken, late quartermaster and brevet major, Ohio militia in the war of 1812, from the adverse action of the Bureau of Pensions on her claim for widow's pension, No. 44087.

The claimant filed her application for pension February 6, 1886, as the widow formerly of Daniel Milliken, who served in the war of 1812, and died November 8, 1849. Her claim was rejected, February 26, 1886, on the ground, as stated, that prior to the passage of the act of March *9, 1878, the date her pension* would commence, if allowed, the claim*ant had remarried* and ceased to have title to pension.

From this rejection an appeal is taken, Hon. James E. Campbell, M. C., presenting the appeal.

It appears that the soldier served, as stated, in the war of 1812, and that his widow subsequently married one James Morrison, from whom she obtained a divorce, and who died prior to the passage of the act of March 9, 1878, which act gives a service pension to officers and soldiers of the war of 1812, and, in case of death, to their surviving widows.

Such are the material facts, and to them we must apply the law. In the act above quoted, which embraces persons "who served for fourteen days in the war with Great Britain of 1812, or who were in any engagement and were honorably discharged, and the surviving widows of such officers and enlisted and drafted men," there is found the following proviso:

Provided, That the pensions to widows provided for in this act shall cease when they shall marry again.

The attorney makes an elaborate argument to establish the proposition, "once a widow, always a widow," and insists that this is the correct doctrine where property rights are concerned. He cites the instance of dower allowed a woman in the property of two successive and deceased husbands, and thereon contends:

First. That the remarriage referred to in section 4,708, Revised Statutes, and in the act of March 9, 1878, is a remarriage that is consummated after the passage of the law;

Second. That if this position is not tenable, then, it is only a remarriage that may have existed at the enactment of the statute.

The question presented by this appeal is, whether the act of March 9. 1878, granting pensions to widows of soldiers who had served fourteen days in the war of 1812, can be construed to act retrospectively upon said widows with regard to remarriage as affected by the inhibition contained in the proviso of section 2 of said act. If said inhibition can be held to act retrospectively and to include cases wherein the widow of a soldier of the war of 1812 had remarried prior to the passage of the act, then, your rejection of her claim was unquestionably proper; but, if the scope of said act is prospective solely, then, her remarriage prior to its passage would certainly not defeat her claim for pension.

It has been decided by the Supreme Court of the United States in the cases of United States *vs.* Teller (7 U. S. Supreme Court, p. 64), and Walton *vs.* Cotton (19 How. p. 355) that no pensioner has a vested legal right to his pension, and that the pension, even when in possession, is not such a vested right that no future legislation can affect the holder, it being a bounty of the Government, which Congress has the right to give, to withhold, and to recall at its discretion. Thus, it is a settled rule that Congress may, if it see fit, legislate with regard to pensions *so as to* affect them retrospectively as well as prospectively. *But such legislation* is prohibited by the provisions of the

Constitution of the United States with regard to vested rights; and yet it is well settled that no statute relating even to pensions should be construed to act retrospectively, unless the intent of the legislature that it shall so act be clearly and conclusively enunciated. This is a fundamental rule of construction which has always obtained in interpreting legislative enactments that have a retroactive effect.

The statute under consideration is one granting and creating in the widows of soldiers therein designated an original right to pension—a right which never existed at any previous time, and which is carved out by this statute alone. Consequently, the act must be construed with reference to its own provisions, and without reference to those of any other statute. There is nothing in the language of the statute to indicate that it was the intention of Congress that it should have a retrospective effect. The language is that "the pensions to widows provided for in this act shall cease when they shall marry again." There is no conflict between the construction here placed upon the remarriage of widows, who are pensioners under this act, and that placed by the Department upon the inhibition imposed by section 4708 of the Revised Statutes upon widows, dependent mothers and sisters entitled to pension under the general pension laws. In the latter cases the provisions of 4708 simply re-enact an inhibition which was imposed upon this class of pensioners in the act creating the right to pension, which has been continued without material change down to the present time in the various re-enactments of the pension laws. The inhibition imposed by said section 4708 has, as a matter of fact, never been held to act retrospectively, it having rested continuously upon widows and upon others included therein from the time their right to pension first accrued.

If the appellant had married the second husband after the act of March 9, 1878, was passed, and had claimed a pension as widow of a former husband, she would undoubtedly have incurred a forfeiture under the law, not because she was not the widow of the first husband after the marriage with the second, but because the marriage with the second husband brought her within the inhibitory provision of the statute. This exclusion embraced all widows of soldiers of the war of 1812 who should marry after the passage of the act, but it can not be extended to those who married a second husband before the act was passed, unless the word "widow" is to be so construed as to make the woman cease to be the widow of the first husband by reason of her marriage with a second. This would introduce a ground of exclusion which the statute does not contain. The statute uses the term "widow," not according to its popular or its social meaning, but as descriptive of a legal status.

The statute of March 9, 1878, evidently includes all the officers and *men who served fourteen* days in the war of 1812 and who were sur*viving at the time of its* passage, and if they were not surviving, then,

their "surviving widows"; and it directs their names to be placed on the pension rolls. Section 2 of said act declares that "the pensions to widows provided for in this act shall cease when they shall marry again." In both cases the term "surviving" means living at the time of the passage of the act. If the soldier was living, then, his name, by operation of the act, was placed upon the pension rolls. If the soldier was not living, but his wife was, then her name went upon the pension rolls.

No proviso is interposed to prevent the widow's name being put on the pension rolls in case she married again before the act took effect. It is only by holding that the term "surviving widow" is confined to those who have not married again that such a result can be reached. But against this construction the manifest intent of the proviso at the end of the second section makes it clear that the only widows whom the law intends to exclude are those who, having received a pension under the act, shall have married again. When they do so the pension is to "cease." A widow, who married a second husband, and whose second marriage was dissolved by either death or divorce prior to the passage of the act, is none the less the "surviving widow" of her first husband, who would have been entitled to the pension if he had been living when the act was passed.

Section 6 of the said act, covering the cases of surviving widows of pensioners whose names had been stricken from the rolls, and that of the pensioner who had died without his name having been restored to the rolls, evinces the same comprehensive policy. The purpose of the entire act was to create for widows a new claim to a pension on account of the service of the husband in a certain war, which should come into operation after the passage of the act; and it is no answer to this claim to hold that, before it was created, the woman had married a man who was dead before the act was passed. It is otherwise in the cases of women who, having obtained pensions under the act and while receiving such pensions, have married again. The policy of the law in such cases is to terminate the pension, because the presumption is that the woman can be supported by the second husband. The policy is just the other way in the cases of women who had no husbands when their right to a pension was created by a new statute. This is the reason why the disqualification was made prospective, or springing from a change of condition, voluntarily made, after a pension had been obtained. It should be observed that the exclusion made by the proviso at the end of section 2 is the cutting off of a pension that has been obtained. It does not cut off the claim or right to a pension which the statute grants to widows. This subsists during the woman's life, and the Department is unable to see how it can be affected by the fact that she married a man who died before the act was passed. If the pension be now allowed, *and she should marry a third husband, of course she would forfeit it. But as yet* there is no pension that can be forfeited.

there is only a right to receive a pension, and this the statute does not forfeit.

For the foregoing reasons the Department is clearly of the opinion that the inhibition contained in the aforesaid act can not be construed as having a retrospective effect. The marriage of the appellant to a second husband, who died leaving her a widow prior to the passage of the act, is no bar to her receipt of a pension thereunder.

Your action rejecting this claim upon said ground is therefore reversed, and you are directed to place the name of the appellant upon the pension rolls as the surviving widow of Daniel Milligan, in accordance with the provision of said act of March 9, 1878.

PENSIONS UNDER SPECIAL ACTS.

PETER J. CRATZER.

The Department adheres to the ruling in the case of Edwin R. Tucker, of February 6, 1886 (P. D., vol. 1, p. 1), wherein Assistant Secretary Jenks held that "the effect of a special act granting a pension is to cut off the pensioner from all claim to arrears or to any other additional sum of money of whatsoever character other than or in addition to that expressly provided for in such special act," and, also that, "when the law-making power has, by a special act, granted a pension to a particular person, the presumption is that the act measures the *full* bounty intended to be conferred by way of pension, and that no additional amount whatever shall be granted under the general law, unless provided for by the special act."

Assistant Secretary Hawkins to the Commissioner of Pensions, June 15, 1888.

I return the accompanying papers in the case of Peter J. Cratzer, late of Company K, One hundred and thirty-eighth Indiana Volunteers, the same having been considered in the adjudication of his appeal from the action of your office adverse to the rejection of his claim for increase of pension on account of new disabilities, certificate No. 131208.

Claimant filed his original declaration May 30, 1866, alleging that, during his military service, he incurred rheumatism, an affection of the liver, and the disuse of his right arm and leg. The claim, as set forth in this declaration, was not sustained by competent evidence, and was rejected by your office in pursuance of section 6 of the act of Congress approved July 4, 1864, which provided that claims for pension thereafter filed, but which were not prosecuted to a successful issue within five years from the date of filing declaration, could not be admitted without satisfactory record evidence in the War Department to establish the same.

Subsequently to the foregoing proceedings, claimant was pensioned *at $4 per month for* chronic rheumatism, by special act of Congress,

and, thereafter, the rating was increased to $6 per month from May 8, 1876.

Claimant filed, November 7, 1884, in your office, an application for increase of pension based upon his original disability, paralysis of the right arm and leg, and deafness of the right ear. This application was rejected, March 23, 1888, upon the ground that, "inasmuch as claimant had applied to Congress for special relief, he had relinquished his pensionable rights under the general law, and he should appeal to that body for relief from all causes of disability on account of which he believed himself to be entitled to pension."

From that adverse action this appeal was taken.

OPINION.

This appeal involves the inquiry as to whether or not claimant, having carried his original declaration for pension to Congress, and there procured relief by special act for his alleged disabilities, can now obtain additional relief or additional pension under the general law for his alleged disabilities. In adjudicating this appeal from your adverse action, the fifth section of the act of Congress approved July 25, 1882, is recalled. That section is as follows:

SEC. 5. That no person who is now receiving or shall hereafter receive a pension under a special act shall be entitled to receive in addition thereto a pension under the general law, unless the special act expressly states that the pension granted thereby is in addition to the pension which said person is entitled to receive under the general law.

The foregoing section is restrictive in its character. It was evidently intended to limit the pensionable rights of claimants who seek relief through special legislation, and, accordingly, the Department held in the case of Edwin E. Tucker, decided by Assistant Secretary Jenks, February 6, 1886 (P. D., vol. 1, p. 1) that "the effect of a special act granting a pension is to cut off the pensioner from all claims to arrears, or to any other additional sum of money of whatever character, other than or in addition to that expressly provided for in such special act." The wisdom of this ruling is apparent in view of considerations of public policy which should forbid a claimant to seek relief for his disabilities in separate measures, or from both the legislative and the executive branches of the Government. He must adhere to one or to the other, and not be allowed to shift his complaints between the two, from time to time.

Another substantial ground upon which repose serious legal objections to this appeal was stated by the Department further along in the aforementioned decision, the Assistant Secretary saying that, "when the law-making power has by a special act granted a pension to a particular person, the presumption is that the act measures the full bounty intended to be conferred on that person by way of pension, and that no *additional amount whatever* shall be granted under the general law,

unless provided for under and by the special act. It is a significant fact that, in addition to the clearly expressed restriction in this ruling, there does not appear in the special act of which claimant is the beneficiary any exceptional clause whereby claimant might receive, as "expressly provided for," any "additional amount" of pension "under the general law."

In conclusion, claimant is reminded that, having gone to Congress through his own choice in the first instance, he must look now in the same direction for whatever "additional amount" of pension he may be entitled to receive for the disabilities which he alleges in the accompanying papers; and, with this view, the action of your office rejecting his claim for increase is affirmed.

RES ADJUDICATA.

JOHN H. GLEASON.

Where a claim has been fully considered and adjudicated on its own merits, adversely to claimant, the Department will not re-open the same for reconsideration, unless there be offered "new and material evidence" in addition to that upon which the former decision was based.

Assistant Secretary Hawkins to the Commissioner of Pensions, March 26, 1888.

Herewith are returned the papers which accompanied your report of March 13, 1888, upon the appeal of John H. Gleason, late first lieutenant and lieutenant-colonel Sixty-third New York Volunteers, from your action refusing to re-open his claim for pension.

This claim was originally rejected by your office, after a thorough special examination, June 30, 1882, upon the ground that the "alleged causes of disability did not originate in the service and line of duty. Fits or spasms probably due to intemperate habits; injury of feet incurred since leaving the service."

The claimant appealed from this action, and, on June 6, 1884, the Department affirmed said action in an exhaustive opinion fully discussing the evidence filed in support of the claim, and stating the ground of its action.

No motion for a reconsideration of said decision was filed with the Department, but it appears that, subsequent thereto, the claimant filed an affidavit of his wife retracting a part of her original testimony, which was considered by your office; but, as stated in your report, said testimony was not deemed sufficient to change the status of the claim.

The claimant, then, on February 24, 1888, filed an appeal from your said action refusing to re-open his claim, contending that the testimony *subsequently* filed by him was "new and material evidence" bearing *upon the point of* rejection, and sufficient to warrant a re-opening of *his claim, and to entitle* him to the pension claimed.

OPINION.

This claim presents a state of facts that has often been passed upon and decided by the Department. Your original action of rejection has been affirmed by the Department on appeal, and the claim fully and finally adjudicated on its merits adversely to the appellant, and is *res adjudicata.*

The evidence filed since the final rejection of the claim, consisting merely of an affidavit obtained by appellant from his wife, contradicting some of her former testimony before the special examiner, can in no sense be considered such new and material evidence as would justify the re opening of the claim and the setting aside of the former judgment of the Department, in accordance with the rule laid down by the Department in numerous decisions. (See cases of Tyner, Noah N., 1 P. D., p. 21; Hoyt, Berney, id., p. 70; Jones, Roland M., id., p. 162; Gordon, Morgan, id., p. 188; Swartz, John, 2 P. D., p. 3; Mullen, Chambers C., id., p. 18; Colnor, Edward A., id., p. 21.)

Your action refusing to re-open this claim is accordingly affirmed.

DEATH CAUSE—WIDOW'S CLAIM.

EMMA E., WIDOW OF DANIEL L. SPRONG.

Where the immediate cause of a soldier's death is in doubt and becomes the subject of medical investigation, the formally expressed opinion of the medical referee of the Bureau of Pensions will, in pursuance of a settled practice, be generally accepted by the Department as conclusive of the question.

Assistant Secretary Hawkins to the Commissioner of Pensions, June 20, 1888.

Herewith are returned the papers which accompanied your report of 15th of June, 1888, upon the appeal of Emma E. Sprong, widow of Daniel L. Sprong, Company C, Twenty-first Kentucky Volunteers, from your action rejecting her claim for widow's pension.

The soldier enlisted on the 18th of November, 1861, was discharged on the 28th of November, 1862, and died on the 16th of November, 1887. He filed a declaration for pension on the 28th of June, 1880, alleging that, near Campbellsville, Tenn., about June, 1862, from exposure, improper diet, and hard marching, he contracted chronic diarrhea and lumbago, totally disabling him and causing his discharge.

A pension was granted him at the rate of $4 per month from the date of his discharge; a re-issue was granted at $6, commencing same date, and at $8 from the 27th of August, 1884, for spinal irritation and chronic diarrhea.

Claimant filed a declaration for widow's pension on December 3d, 1887, alleging that soldier contracted chronic diarrhea in the service,

resulting in disease of kidneys, lungs, heart, and nervous debility, from the effects of which he died.

In support of this theory she submitted affidavits of Dr. John S. Robertson, who attended soldier in his last illness and who was his family physician for years.

In the affidavit of the 24th of February, 1888, Dr. Robertson states that soldier died of general debility occasioned by lung disease and disease of kidneys, causing general dropsy. On the 15th of March, 1888, he states that, in the summer of 1884, he treated soldier for chronic diarrhea and cough, as well as for general debility resulting from these troubles, and that, in his opinion, the cause of his death resulted from the chronic diarrhea and lung disease incurred whilst in the Army.

The record of the War Department shows that soldier, while in the service, was afflicted with epilepsy, spinal irritation, and partial paraphlegia, but mentions no other disability.

It also appears that he was admitted to the Soldiers' Home, at Dayton, Ohio, on the 10th of June, 1880, suffering from acute rheumatism, followed by lumbago, milliary tubercular phthisis pulmonalis, and general debility. He was never in the hospital at that institution, and was discharged from it, at his own request, on the 19th of December, 1883.

The testimony in the case was submitted to the medical referee on the 6th of April, 1888, for his opinion as to "whether the evidence warranted the conclusion that the cause of death resulted from the disabilities for which pension was granted." On the 12th of April, 1888, that official replied that, in his opinion, "the evidence in this case does not warrant the conclusion that the cause of death resulted from either or from both the disabilities for which pension was granted. The soldier has admitted an attack of yellow fever at Mobile, Ala., in 1862, and the report from the National Home, Ohio, shows acute rheumatism in 1880, which disease was sufficient to account for the factors in the death cause, as enumerated by Dr. John S. Robertson. The evidence in this case does not show a degree of severity of chronic diarrhea sufficient to warrant the conclusion that any of the death causes were sequential thereunto."

In harmony with the opinion and the other evidence in the case, the claim was rejected on the 18th of April, 1888, when an appeal was taken and notice thereof filed on the 1st of June, 1888.

Subsequently, and pending the consideration of the appeal, the papers in the case, including the medical testimony on file, were again submitted to the medical referee for "an opinion as to whether, in view of the information embodied in the papers on file, said rejection was correct from a medical standpoint."

Replying to said reference the medical referee states, in his opinion of the 7th of June, 1888—

> I do not think the papers filed since rejection warrant a change of action. I consider *the rejection to have been* correct from a medical standpoint.

The question presented for decision upon this appeal is simply whether *or not the death* cause of the soldier can be properly ascribed to the dis-

abilities incurred by him during his army service and for which a pension had been granted in his invalid claim.

This is a question of a purely medical character, and for its solution it was properly referred by you to the medical referee of your Bureau. That officer appears to have given all the medical questions presented by the evidence in the claim the most faithful and careful consideration, and holds, in the exhaustive and satisfactory opinion set forth in the foregoing statement of facts, that the death cause of soldier can not be medically ascribed to the disabilities which he incurred in his military service.

It is the settled practice of the Department to be guided, in the determination of questions purely medical, by the opinions of its medical advisers, and to accept as generally conclusive the opinions of the medical referee when based upon the results of medical examinations. (See cases of Gaskell, Lucinda, vol. 1, P. D., page 29; Preston, Patrick, id., page 41; Douglas, John, id., page 52; Garrison, William H., id., page 262; Faulkner, Joseph F., id., page 292; Romine, Uriah W., id., page 299.)

In view of the foregoing well established rule, the Department can see no good reason presented by the facts in this claim to warrant a departure therefrom, and consequently your action rejecting the claim upon the grounds stated in your report is affirmed.

EQUIVALENT DISABILITIES.

JOSEPH BECHER.

Where a claimant is pensioned at $24 per month under the "equivalent" clause in the act approved March 3, 1883, he is not entitled to the increase of $30 per month as provided by the act of August 4, 1886, inasmuch as the act of August 4, 1886, merely substitutes the rate of $30 per month for the loss of or total disability in hand or in foot for the $24 rate provided by the act of March 3, 1883; but it does not provide a rating for *equivalent* disabilities, leaving, as it does, that portion of the act of March 3, 1883, to stand without modification.

Assistant Secretary Hawkins to the Commissioner of Pensions, June 15, 1888.

Herewith are returned the papers which accompanied your report, dated June 2, 1888, on the appeal of Joseph Becher, late a private in Company H, Fifth Regiment Pennsylvania Reserve Volunteers, certificate No. 32549.

The claimant is now in receipt of a pension at the rate of $24 per month under the act of March 3, 1883, for injury of right foot. On December 16, 1887, he filed an application for increase under the act of August 4, 1886, alleging that his disability is greater than the loss of a foot. *In support of his* claim, he filed the affidavit of I. M. Rockefeller, *M. D., who states that the* claimant suffers with a chronic ulcer on the

sole of his right foot, which incapacitates him from performing manual labor equal to the loss of a foot, and occasions a great deal of suffering which the loss of a foot would not do.

Doctor James P. McCleery states in affidavit that he finds the claimant very severely wounded in the sole of right foot, and that he would not be as much disabled if his foot were amputated.

The claimant was then ordered for examination before the Danville (Pa.) Board, who state in their certificate, dated April 11, 1888, that there is considerable loss of substance, and the foot and leg are somewhat atrophied and weaker. Motion of ankle-joint is impeded to a considerable extent, but the joint is not anchylosed. He walks upon the foot and leg, with the aid of a cane, with difficulty and evident pain and distress.

This claim was rejected April 21, 1888, on account of "no increase," under act of August 4, 1886.

From this action the claimant appeals.

OPINION.

The appellant is in receipt of a pension of $24 a month under the act of March 3, 1883, for a disability of right foot equivalent to its loss, and seeks by this appeal an increase of his pension to $30 a month, as provided by the act of August 4, 1886.

It appears that the disability alleged by appellant exists only in his foot, and were he properly rated under the act of March 3, 1883, he would be entitled, by virtue of the provisions of the act of August 4, 1886, to the increase claimed without further investigation and by force of the law itself. The act of March 3, 1883, provides a pension of $24 a month for the loss of a hand or a foot, or for total and permanent disability in the same, and also for those who have been "otherwise so disabled as to render their incapacity to perform manual labor equivalent to the loss of a hand or a foot."

Since appellant's disability is confined to the foot, it is a manifest absurdity to rate him at $24 under the act of March 3, 1883, for a disability therein equivalent to its loss. If his disability of foot is such as to be equivalent to its loss, it must necessarily be total and permanent; and for such a disability said statute specifically provides. If it is less than total, it can not be equivalent to its loss, nor could he be rated under said statute therefor. (See cases of Richardson, M. V. B., 1 P. D., page 373, and Cook, Allen, *Id.*, page 365.)

This proposition, so often enunciated and insisted upon by the Department, appears to be axiomatic and should be self-evident, nor can it be made clearer than by the mere statement of it.

The act of August 4, 1886, merely substitutes the rate of $30 per *month for the* loss of or total disability in hand or in foot, for the $24 *rate provided by the* act of March 3, 1883; but it makes no provision

for a rating for equivalent disabilities, leaving that portion of the act of March 3, 1883, to stand as it was.

Hence it is evident that, if appellant were entitled to the rate of $24 under the only clause of the act of March 3, 1883, by which he could be rated, he must also receive the increased rate provided by the act of August 4, 1886, for the same specific disability, namely, a total disability of the foot. It appears, however, from the medical evidence in this claim that the appellant is not totally disabled in his right foot, and hence the Department is of the opinion that he has been and is now improperly rated at $24 under the act of March 3, 1883; and consequently, as said total disability of foot does not exist, he can not be entitled to the rate of $30 provided by the act of August 4, 1886, simply for the reason that he has been erroneously rated by your office upon former adjudications of his claim.

The Department desires to state, however, that it is not intended herein to reverse the former action of your office nor to direct a decrease of the pension appellant is receiving, unless in your judgment it be necessary by reason of the degree of disability which may be shown to exist at the present time; but it was important to point out the error which has been committed in the rating of this appellant, in order to state the ground upon which the Department feels compelled to affirm your action rejecting appellant's claim for increase under the act of August 4, 1886.

RES ADJUDICATA.

ANN ELIZA, WIDOW OF LOUIS S. LAKE.

The doctrine of *res adjudicata* is applicable where an appeal, having been once decided adversely by the Department, is again presented for consideration, but is not accompanied by such "new and material evidence" as would have changed the status of the claim had it been offered upon the former adjudication of said appeal.

Assistant Secretary Hawkins to the Commissioner of Pensions, June 20, 1888.

Herewith are returned the papers which accompanied your report of June 15, 1888, upon the appeal of Ann Eliza Lake, widow of Louis F. Lake, late private, Company B, Twenty-fifth New Jersey Volunteers, from your action rejecting her claim for invalid pension.

This claim was rejected by your office, May 11, 1887, upon the recommendation and opinion of the medical referee upon medical grounds to the effect that soldier's fatal disease (phthisis) was not a *result* of the disability for which he was pensioned, nor otherwise proved to be due to his army service.

From this action of rejection the claimant appealed June 1, 1887, and, on October 28, 1887, the Department affirmed said action in an exhaust-

ive opinion, thoroughly discussing the evidence filed in support of the claim and stating the grounds of its action.

No motion for a reconsideration of said action was filed with the Department, but it appears that, subsequently, the claimant filed some additional testimony upon the same points previously passed upon in the former adjudication of the claim, which evidence, having been considered by your office, was not deemed sufficient to change the status of the claim, and you adhered to your former action and so informed the claimant.

From said latter action, claimant filed the said appeal, June 16, 1888.

OPINION.

This claim appears to have been before the Department on a former occasion upon appeal from the same action of rejection and involving precisely the same questions. Upon the former appeal your action of rejection was carefully reviewed, the claim thoroughly considered, and the views of the Department thereon embodied in an opinion affirming your action of rejection and finally deciding the case.

No motion for a reconsideration of said Departmental decision was filed by the appellant, nor any action taken in your office looking to that end, except the filing of certain affidavits and some additional evidence all of which is merely cumulative in character, without affecting the question upon which your former action of rejection and said Departmental decision in affirmance thereof were based.

As has been so often decided by the Department, the questions raised upon this appeal are *res adjudicata*, and will not be disturbed except upon proper grounds as set forth in the numerous Departmental decisions hereinbefore rendered upon this subject. (See cases of Tyner, Noah N., Vol. I, P. D., page 21; Hoyt, Birney, Id., page 70; Jones, Roland M., Id., page 162; Gordon, Morgan, Id., page 188; Swartz, John, 2 P. D., page 3; Mullin, Chambers C., Id., page 18; Colnor, Edw. A., Id., page 21.)

Your action rejecting this claim is therefore affirmed.

IMPROBABLE ORIGIN OF DISABILITIES.

RICHARD MILLINER.

Where a claimant, without proof, ascribes his alleged disabilities to unreasonable and improbable causes, and there appears in the evidence a reasonable cause for said disabilities, but wholly disconnected with the military service, the Department holds that the improbable causes, being unsusceptible of proof, should be denied, and the rejection of the claim affirmed as being not only devoid of merit, but intentionally fraudulent.

Assistant Secretary Hawkins to the Commissioner of Pensions, June 12, 1888.

The papers in the appeal of Richard Milliner, of Company F, Fifty-*fourth Ohio Volunteers*, are returned herewith.

The Adjutant-General's report shows that appellant was enrolled October 18, 1861. He is reported on the roll for March and April, 1862, "absent, deserted, April 13, 1862"; on the rolls for January and February, 1863, "present, returned from desertion February 25, 1863"; for May and June, 1863, "present, restored to duty by order of Lieutenant-Colonel Fisher, under President's proclamation, March 10, 1863." He was taken prisoner July 9, 1863, paroled April 16, 1864, and admitted to Jarvis Hospital, Baltimore, April 18, 1864. He was returned to duty August 5, 1864; for November and December, 1864, reported "present"; so reported for January and February, 1865; and was mustered out with his company August 15, 1865. The company was in action at Pittsburg Landing, April 6, 1862. The regiment was on the march towards Jackson, Miss., July 9, 1863. Prisoner-of-war records show him captured at Jackson, Miss., July 9, 1863; paroled at City Point, Va., April 16, 1864, and admitted to Jarvis Hospital, Baltimore, April 18, 1864, cause not stated.

The Surgeon-General's report shows that appellant is borne on a "record of charges" of G. H. at Camp Dennison, Ohio, April 21, 1862, with the remark on the record, "Pittsburg, fits." The record of the hospital furnishes no further evidence. He entered Jarvis G. H., Baltimore, Md., April 18, 1864, from Richmond, with "diarrhea"—no other diagnosis; was furloughed June 15, 1864; deserted July 15, 1864. The records furnish no evidence of the alleged injuries or wounds, nor further evidence bearing on the case.

In original declaration, filed March 27, 1876, appellant alleged that, "while in the line of duty at Pittsburgh Landing, April 6, 1862, during the battle, a cannon-ball cut off the top of a tree, which fell upon him, wounding his neck and back, causing disease of neck and back, with great lameness of both, which disqualify him for manual labor."

In affidavits filed November 7, 1879, he testified his inability to furnish the testimony of his commissioned officers to prove incurrence of the wounds, for the reason that, at the time he received the wounds and injuries as set out in his declaration, he was in the skirmish line, within a few feet of the enemies' works, on a charge, and no officer was present or near him at the time; that immediately after receiving the injury he was taken prisoner and separated from his company for ten or eleven months; that during said time he was in Libby and Belle Isle prisons, and that he can not furnish the testimony of his officers or regimental surgeons to prove treatment for the alleged injuries in service."

In an affidavit filed October 26, 1881, he testified that he "was wounded at the battle of Pittsburgh Landing, April 6 or 7, 1862, and sent up the river to Camp Denison, Ohio, with a number of wounded companions, where he resided at the time. He remained at said place until March 10, 1863, when he rejoined his regiment; and he was treated *in no hospital, being at his* home.

In a letter in pencil, without date or file mark, he says he "was wounded in the back and neck at Pittsburgh Landing, was not taken prisoner, but was sent to Camp Denison and remained at home until March 10, 1863; that he was wounded in the back and neck at Jackson, Miss., July 9, 1863, and taken prisoner and paroled April 16, 1864;" was wounded both times alike.

When before Special Examiner, F. G. Coldren, appellant testified that he was injured in the back and neck—by a tree top in the back, and by a bayonet in the neck—at Pittsburgh Landing. It happened in the midst of the battle. The division which he was in was sent to the left. The enemy was getting the best of it and driving us (them) back towards the river. The gunboats were throwing shells over them at the rebels. The claimant's troops were in the woods and a shell or ball cut off a tree-top, and it fell on his (claimant's) back. The rebels drove our men back, and one of the enemy bayoneted him in the neck as he lay on the ground. Afterwards the enemy were driven back and his comrades carried him off the field. He was stabbed as many as three or four times by the rebel in the neck; that he did not know any comrade who saw him at the time he was wounded, but comrades Foughty and Smith assisted to take the limb or tree-top off him; that he was carried from the field to a boat and taken thence to Cincinnati, and from there by rail to Camp Denison, Ohio. At Camp Denison he was not taken to the hospital, but to a private house, where he staid as much as ten months; while there he was treated by a surgeon, but is not able to furnish his testimony.

He returned to his regiment after the President's proclamation, concerning deserters, of March 10, 1863. He was on the skirmish line advancing on the rebel works at Jackson, Miss. They came on the rebels' main works. They, the enemy, were throwing shell into the woods; a falling limb struck him, knocking him down. The line fell back and he was captured. One of the enemy wounded him in the neck with a bayonet at that time once; that he was wounded in the back of the neck by a bayonet at that time and struck by a falling limb, but does not claim any pension on account of such injury.

The case was placed in the hands of special examiners and a very thorough investigation made, a large number of witnesses being interviewed. On August 25, 1885, the claim was rejected by your office in the following terms:

> Rejected on the ground that the alleged injuries were not incurred in the military service and line of duty. That it is shown that claimant had one or more scars on his neck prior to enlistment, and tends to show scrofula existed when a boy. The best obtainable testimony fails to establish injury to back in service. He was a deserter from April 13, 1862, to February 25, 1863, which of itself would under the Commissioner's order of July 20, 1885, render the case inadmissible, even if no other *grounds of rejection* appeared in the testimony, and the claim appears to be without *merit.*

Subsequent to this rejection claimant filed some additional testimony, *which was duly considered*, and the former action of your office adhered

to, on the ground stated, and, also, because the new testimony was not deemed sufficient to prove the incurrence of either of the alleged disabilities in the service and line of duty.

From this action of rejection claimant appealed on May 22, 1888, on the ground that "he feels injustice has been done him, not an intentional wrong, but by misconstruing the evidence, and asks that his case be reviewed and justice and equity accorded him."

The case now comes before the Department on this appeal.

OPINION.

This claim, which has been thoroughly investigated in your Bureau and by the Department, is not only devoid of merit, but is of such character that the suspicion is justified that, to some extent at least, it is deliberately fraudulent.

Credulity is taxed to believe that in two battles, occurring more than a year apart, a soldier should in both engagements be wounded in precisely the same manner, and that the manner of the wounding should be so unusual and peculiar. He says, in substance, that at the battle of Shiloh (or Pittsburgh Landing) in April, 1862, he was knocked down, pinned to the ground, and stunned by a falling tree-top, which was cut off by a cannon shot fired by the enemy. This is not an improbable occurrence, as it is well known that that battle was fought in a heavily timbered country, and falling limbs, detached by artillery fire, encumbered the ground and might, and perhaps did, strike the soldiers who were operating in the woods. But claimant adds that, while he was lying on the ground, unconscious and buried beneath the tree-top, one of the enemy's infantry stabbed him in the neck with his bayonet three or four times. Bayonet wounds were extremely rare, as the medical history of the war clearly shows; but that any man, on either side, would have deliberately bayoneted a man in the condition and attitude this man says he was in, is hardly to be believed—or, if such a thing really occurred, that any soldier could inflict four bayonet wounds on the neck of a man lying unconscious on the ground with no other result than four flesh wounds that were, for long after, running sores of a scrofulous character, is not credible.

But this extraordinary story does not stop here. At the battle of Jackson, Miss., over a year later, claimant alleges that he was again knocked down by another tree-top, cut off by another cannon shot, and, while again unconscious, he was again bayoneted in the neck by another Confederate soldier.

The claimant can not have confounded or in any way mixed up in his mind these two battles, for, when being examined by Special Examiner Coldren, on March 11, 1885, at Harper, Ohio, that officer asked him the following question: "Do you mean to say that at two different times *in the service, in a single day* in each case, you were knocked *down by the limb of a tree*, and bayonetted in the neck?" to which the *appellant answered*, "Yes, sir," etc.

No witness has been produced who saw or had personal knowledge of any of these alleged incurrences.

And further: There are glaring inconsistencies in claimant's several statements. In 1879, he says that, after he was wounded at Shiloh, he was taken prisoner and sent to Richmond, where he was held some ten months a prisoner of war. Two years later he states that, after he was wounded at Shiloh, he was "sent up the river to Camp Denison, Ohio, with a number of wounded companions, where he resided, and that he remained at that place until March 10, 1863, when he rejoined his regiment." The fact is that he deserted immediately after the battle of Shiloh and went home, where he remained until he had the opportunity to avail himself of the amnesty granted deserters in the President's proclamation of March 10, 1863, when he rejoined his regiment, and so escaped punishment.

The testimony obtained on special examination shows that he had scars on his neck prior to enlistment, and that they were caused by scrofulous sores which he had when a boy. These are the scars which he says are the result of bayonet wounds. The best obtainable evidence fails to show that he received any injury to his back while in the Army. On the contrary, it is developed by special examination that he always walked with a slight stoop, and carried his head slightly on one side. It is shown, also, that he sometimes had "fits" prior to enlistment. Appellant appears to have been in hospital in Pittsburgh, in April, 1862, subsequent to the alleged incurrence of the injuries at Shiloh, the only disability then noted in the record being "fits." Again, in June, 1864, he was treated in hospital for "diarrhea," but no claim is made for any disability from that cause. The hospital records are silent as to treatment for the numerous bayonet wounds in the neck and the injury to back, as alleged, and the Department can not avoid the conclusion that the claimant never received any such injuries.

The action of your office in rejecting this claim is affirmed.

ACCIDENTAL PISTOL-SHOT WOUNDS.

GEORGE M. BEELER.

1. A pistol is not properly a part of an infantry soldier's equipment, and the Department holds that, where an infantry soldier incurred an accidental wound by the dropping of a pistol from his own person, even though the soldier had been granted "permission" to carry the weapon when on duty, there is no legal basis for pension.
2. Where an infantry soldier, carrying, by "permission," a pistol on his person, fails to comply with the requirements of the service in handling the weapon, he is guilty of "gross carelessness and contributory negligence," if, thereby, an accidental wounding ensue; and such wounding will not be pensionable.

Assistant Secretary Hawkins to the Commissioner of Pensions, June 18, 1888.

The papers in the case of George M. Beeler, late sergeant Company C, *Twelfth Kentucky* Volunteers, are returned herewith.

The Adjutant-General's records show appellant enlisted as a corporal October 3, 1861, and was mustered out with detachment February 3, 1865, by reason of expiration of term of service.

The Surgeon-General's records show that claimant entered General Hospital, Bowling Green, Ky., May 31, 1863, with gunshot wound in the ankle. This ball was a revolver ball, and went in on the right side and came out on the left. Diagnosis, also, given as pneumonia and gunshot wound in foot. The records furnish no evidence of other wound or injury or treatment during the service.

In a declaration filed October 6, 1879, appellant alleged that, while in the line of duty at Bowling Green, Ky., about July, 1863, he was wounded in the right ankle or heel, by a pistol ball in the following manner: "His (claimant's) company was doing provost duty at Bowling Green, Ky., and, on the morning the injury was received, deponent says that, while in the act of waking up the relief guard, his pistol fell from its case on his belt, striking the pavement in such manner as to discharge the ball into his ankle; said ball glanced off the ankle bone and passed backwards and out through the heel;" and he claims a pension for disability from that cause.

In an affidavit, filed August 27, 1883, claimant testified that he received the alleged injury in May, 1863; that at the time he was assisting the corporal to wake up the guard at about daylight, and that, while so engaged, his pistol fell from his scabbard and was discharged, causing the injury.

In an affidavit, filed March 5, 1887, he testified his inability to furnish testimony from eye witnesses to prove incurrence of the alleged wound for the reason that the wound was received in the night when the soldiers were asleep, and no one saw the accident or knew anything about his being wounded until the guard awoke from the report of the shot and saw him wounded; that at the time he was sergeant of the guard—a detail of soldiers sent into Bowling Green, Ky., to do provost guard-duty—and that he had orders and authority from the colonel of the regiment to carry a pistol when on duty.

When before Special Examiner, R. C. Getchell, July 18, 1887, appellant further testified that he received the alleged wound some time in July, 1863; the fall of the pistol caused it to explode; no one saw the explosion; the other man who was assisting him to awake the guard was some dozen rods away at the time, and appellant does not recollect who he was; the fall of the pistol was what caused it to explode, as the hammer was on the cap and the holster was not buttoned or fastened; that, after receiving the wound, he was sent to the hospital, where he remained for treatment seven weeks; that he bought the pistol from a store and had it some time before he was wounded; that Colonel Haskins gave orders through Captain Crosier that he deemed it necessary for sergeants to carry a revolver *instead of* a gun and cartridge-box while on duty; *that he carried the pistol* for self-protection and use in case of an emer-

gency; all of the sergeants, but none of the privates carried pistols at Bowling Green; that he is unable to prove by any officer or comrade that he got the wound as he had stated, adding, "It was quite dark at the time and I stood for fully ten minutes before any one got to me to see what the matter was," and, as to any eye-witness to the occurrence, there was none.

The claim was put in the hands of a special examiner, and on May 11, 1888, was rejected by your office on the ground that "the pistol wound of right ankle was not due to his military service and line of duty. The accidental wound from a revolver, the private property and no part of the regulation arms of an infantry soldier, gives no right to pension, and permission to carry the same does not throw the responsibility upon the Government."

From this action appeal was taken May 28, 1888, the general contention being that this pistol formed a part of his equipment, because he had been "ordered" by the colonel of his regiment to carry it while on duty, in place of his gun.

The case now comes before the Department on the appeal.

OPINION.

The subject of disabilities due to pistol-shot wounds sustained by infantrymen from pistols in their possession was thoroughly discussed by the Department in the case of William H. Pike (Pension Decisions, Vol. I, p. 253), and the principle therein laid down will be adhered to in all analogous cases, viz: "A soldier accidentally wounded by a weapon in his own hands—it not being authorized by regulations nor order—has no basis for pension."

There is no escaping the fact that a pistol is no part of the authorized equipment of an infantry soldier. His arms are limited, by regulation and by universal usage, to his musket and bayonet. If he adds to these weapons any other arm, be it pistol, or knife, or sword, or any arm whatever, even though he may have received permission to carry and use the same, he does so at his own risk. If any infantry soldier were ordered by competent authority to carry a pistol or other weapon in lieu of, or in addition to, his proper armament of musket and bayonet, then, the case would assume a different aspect. Not infrequently infantry regiments or detachments were ordered to be mounted, and pistols were issued to them, as to the cavalry; but no such state of affairs obtained in the appellant's regiment. He sets up, in his appeal, that the colonel of his regiment "ordered" the non-commissioned officers of his regiment to carry pistols. This the colonel denies before a special examiner, but, at the same time, admits that he gave the non-commissioned officers "permission" to carry pistols. It was not compulsory. It was not "an order," in any sense of the word, military nor otherwise. In fact, *the colonel did not* have authority to compel any enlisted man to pur*chase, at his own* personal cost, a pistol nor any other arm. The main

contention of the appeal, that the soldier procured and carried this pistol because he was "ordered" so to do by his commanding officer, is absolutely without foundation.

But, admitting that the soldier had proper authority to carry a pistol, he is barred from pension by reason of his contributory negligence and gross carelessness in handling that weapon. He has admitted, before the special examiner, that the hammer of the pistol was let down on the nipple, resting on the percussion cap, and that the pistol fell out when he stooped over to wake the sleeping man, because the holster was not buttoned, buckled, or otherwise properly fastened. Every soldier knows that pistols, carbines, and muskets are to be, by tactics and regulations and time-honored custom, always carried at half-cock, in which condition it is next to impossible to explode the piece. To carry a pistol or other fire-arm with the hammer resting upon the cap is to invite an involuntary explosion, and is an act of gross carelessness and contributory negligence if an accident ensues. To fail to properly fasten a pistol holster, in order that the pistol may not drop out, is, also, evident carelessness and contributory negligence, if an accident ensues.

The appellant has no title to pension. The act of rejection by your office was eminently proper and is affirmed.

ADULTEROUS COHABITATION.

MINERVA, WIDOW OF WASHINGTON C. BEEDE.

1. The statute of August 7, 1882, appertaining to adulterous cohabitation, must be construed as having a retrospective as well as a prospective bearing in relation to the pensionable rights of widows who may have or may become guilty of open and notorious adulterous cohabitation; otherwise, the purpose of the law would be defeated. Having directed that a soldier's widow upon her remarriage should lose all claim to pension, the intention of Congress in passing the act of August 7, 1882, was to subject to a similar deprivation such widows as, without formal and legal marriage, led lives of shame, and thereby brought dishonor upon the memory of their husbands.
2. The essential feature of adultery, in its strict signification, is the criminal act of a married person, but the crime is committed whether the accomplice be married or single. Congress did not intend to deprive soldiers' widows of the governmental bounty when criminally intimate with married persons and at the same time, to ignore this crime when committed with persons who were not bound by the ties of marriage.

Assistant Secretary Hawkins to the Commissioner of Pensions, June 18, 1888.

Herewith are returned the papers *in re* No. 63415, of Minerva Beede, widow of Washington C. Beede, Company I, Ninth Vermont Volunteers.

It appears from the records of the War Department that soldier enlisted on the 23d of December, 1863, was mustered into the service on the 2d of January, 1864, and died a prisoner of war in Andersonville, Ga., on the 6th of September, 1864.

A pension was granted to claimant, as the widow of soldier, commencing on the 6th of September, 1864, the date of soldier's death.

Claimant was dropped from the rolls after a special examination into her claim, the 21st of December, 1886, upon the ground of open and notorious adulterous cohabitation.

From this action claimant appealed, contending that living with an unmarried man does not constitute open and notorious adulterous cohabitation.

It is admitted by appellant that, since the death of her husband, she has given birth to four illegitimate children, of whom three are now living and one dead. In her testimony before Special Examiner Curran, she admits that she lived with John G. Bond for seventeen years; that she was never married to him and that she had four children by him.

In her affidavit of the 27th of November last, she testified: "I am sorry to say that since I have been working for Mr. Bond I have been unfortunate in giving birth to four illegitimate children. It is not known publicly who the father is of the children, but I wish to state emphatically that he is an unmarried man."

This admission is of itself sufficient, under the uniform rulings of the Department upon the subject, to defeat the claim of appellant for restoration, and to fully establish the open and notorious adulterous cohabitation of the appellant required by the provisions of section 2 of the act of August 7, 1882, to terminate her pension. It also discloses one of the grounds of her appeal, namely, that her criminal intercourse was with an unmarried man and, therefore, not adulterous.

In the case of the widow of George Martin (No. 270571, 4th December, 1885, Digest 1886, page 19), it was held that there could be no stronger proof of open and notorious adulterous cohabitation than the birth out of wedlock of two bastards. This ruling has been approved and acted upon by the Department in numerous decisions, and has long been recognized as an established and settled precedent. (See cases of Mary E., widow of Demos M. Miller, 1 P. D., page 171, and Mary E., widow of Francis Boeke, *id.* page 427.)

Appellant, through her attorney, contends that "as adultery is the voluntary sexual intercourse of a married person with one not the husband or wife, and as the father of the illegitimate children is an unmarried man, claimant can not be guilty of adulterous intercourse as required by section 2, act of 7th of August, 1882."

This statute is not to be construed by the application of strict and technical rules, as required in the administration of criminal law. Such *a construction would* defeat the object of the enactment. Congress had

already directed that a soldier's widow, upon her remarriage, should lose all claim to pension, and its intention in passing the act of August 7, 1882, must have been to subject to a similar deprivation such widows as, without formal and legal remarriage, led lives of shame, and brought disgrace and dishonor upon the memories of their husbands. Congress could not have intended to use the word "adulterous," according to its literal signification, as meaning "the unfaithfulness of a married person to the marriage bed," as it assumes that the widow still remains unmarried. The term, therefore, must be regarded as descriptive of such acts of immorality and lewdness as would deprive a widow of her pension. By such a construction the intent of the legislature in enacting such a measure and the accomplishment of the object for which it was intended will be alike consulted.

The theory of applicant's attorney that claimant could not be guilty of adultery with an unmarried man is utterly untenable, even should the term be regarded in its general acceptation. The essential feature of adultery in its strict signification is the criminal act of a married person, and the crime is admitted whether the accomplice be married or single. Congress did not intend to deprive soldiers' widows of the governmental bounty when criminally intimate with married persons and to ignore this crime when committed with persons who were not bound by the ties of marriage. The adjudication in this case is not under the criminal law and the phrase is not necessarily confined to the meaning given to the word in criminal decisions and in criminal jurisprudence.

Neither can it be contended that, because her illegitimate children were born *prior* to the passage of the act of the 7th of August, 1882, said act should not operate to terminate her pension; in other words, that the provisions of that act have not nor can they be construed to have a retroactive effect. Without entering more fully into the question, it is sufficient to say that the language of the act shows it to be retrospective in its character. Section 2 of the act of August 7, 1882, provides that "the open and notorious adulterous cohabitation of a widow, who is a pensioner, shall operate to terminate her pension from the commencement of such cohabitation." This language clearly shows that its provisions were intended to apply to such conduct of the pensioner as is therein described, whether prior to or subsequent to the passage of the act.

Your action in dropping appellant from the pension rolls, upon the grounds stated in your report, is accordingly affirmed.

RESTORATION—CERTIFICATE OF DISABILITY.

JOSEPH D. SAWYER.

Where the verbal evidence relating to the origin and character of claimant's disabilities is conflicting, but claimant has both a hospital record and a certificate of disability corroborating his declaration and explicitly stating that his alleged disabilities were incurred in the line of duty, the conflicting verbal testimony should be eliminated from the case; and claimant's hospital record, fortified by the aforesaid certificate, will be accepted as conclusive evidence in support of his title to pension, unless there appear palpable fraud or error in said record evidence; and where said claimant's name was dropped from the roll of pensioners on account of the aforementioned conflicting verbal evidence, it should be restored in conformity with the rulings of the Department relating to the superior value as evidence of a hospital record and of a surgeon's certificate of disability over mere verbal testimony.

Assistant Secretary Hawkins to the Commissioner of Pensions, June 16, 1888.

Herewith are returned the papers which accompanied your report of April 13, 1888, upon the appeal of Joseph D. Sawyer, late sergeant, Company I, Twenty-eighth Maine Volunteers, and sergeant, Company L, First Maine Heavy Artillery, from your action rejecting his application for restoration to the pension rolls.

Claimant enlisted in his first service on the 14th day of October, 1862, and was discharged August 31, 1863. He enlisted in the second service, December 24, 1863, and was discharged from the service on certificate of disability January 14, 1865. He filed his original appliction for pension, August 24, 1865, alleging as the basis of his claim chronic rheumatism, resulting deformity of the hands, and distortion of fingers, contracted in the service on or about February 20, 1864. He was pensioned for said disability January 28, 1867, at $8 per month from January 14, 1865, which was afterward increased to $15 per month from December 23, 1869; $18 per month from June 4, 1872; $24 per month from October 5, 1881; and, on June 12, 1883, his pension was further increased to $30 per month from March 3, 1883, for increased disability from pensioned cause.

Upon representations made to your office, July 1, 1888, by a special agent thereof, to the effect that the disability for which claimant was pensioned existed prior to enlistment, the case was sent out for special examination for the purpose of determining the origin of the alleged disability.

After a full and exhaustive investigation, made by two different special examiners, claimant was dropped from the pension rolls November 24, 1883, on the ground that the evidence obtained on said special examinations showed that the rheumatism and deformity of hands, for *which he was pensioned*, existed prior to enlistment.

On October 15, 1883, claimant applied for a reconsideration of his claim *for restoration to the* rolls, and filed additional testimony in support of

his claim, tending to show that his disability had been incurred in the service, as first alleged.

The report of the Adjutant General shows that appellant was enrolled as a sergeant in Company I, Twenty-eighth Maine Volunteers, (nine months' service), October 14, 1862. He is reported on the rolls of that organization for November and December, 1862, "present;" for January and February, 1863, "present, sick at regimental hospital;" for March and April and to June 30, 1863, "present." He was mustered out with his organization August 31, 1863. The nature of his sickness is not stated.

Claimant was enrolled December 24, 1863, as a private in Company L, First Maine Heavy Artillery. He is reported on the rolls of that organization for January and February, 1864, "a sergeant, present;" for March and April, 1864, "present;" for May and June and to October 31, 1864, "absent, sick in Washington, D. C.;" for November and December, 1864, "present." He was discharged January 14, 1865, on a certificate of disability.

The Surgeon-General's report shows that claimant was taken on the regimental sick report, March 23, 1864, with "rheumatism" (disposition not shown); was admitted to Mount Pleasant Gentral hospital, D. C., May 16, 1864, from Army of Potomac, with chronic rheumatism, and was transferred May 30, 1864, and on the same day admitted to general hospital at Chester, Pa., with "chronic rheumatism." He was transferred June 11, 1864, and admitted to general hospital at Augusta, Me., June 14, 1864, with rheumatism, and returned to duty November 24, 1864. He was taken on the sick report in regiment, December 23, 1864, with rheumatism, and discharged from the service January 23, 1865.

In the certificate of disability upon which claimant was discharged, it is stated by Capt. Benjamin F. Oakes, commanding Company L, First Maine Heavy Artillery, that claimant has been "unfit for duty for nearly ten months. He was in the nine-months' service on the Mississippi River and received an honorable discharge therefrom, his term of service having expired. Since first disabled (on or about February 26, 1864) his disease (acute rheumatism) has much distorted the joints of both hands, besides otherwise disabling him." In same certificate, H. A. Reynolds, assistant surgeon of his regiment in charge, states that he finds claimant incapable of performing the duties of a soldier because of "muscular contraction and distortion of fingers, resulting from acute rheumatism contracted in performing his line of duty as a soldier. My opinion is that his degree of disability is one-half. This soldier is unfit for the Veteran Reserve Corps."

Since the date of filing his application for restoration to the pension-rolls, claimant has been medically examined by the board of surgeons at Bangor, Me., August 15, 1883, who rate him total, third grade, for disability from rheumatism and resulting distortion of fingers and hands,

but nothing for disease of heart, chronic diarrhea, or deafness, alleged by him in subsequent affidavits.

All the testimony in the case having been carefully considered by you, his claim for restoration was rejected November 18, 1884, upon the ground that the evidence showed that deformity of hands existed prior to service, and the former action dropping the name of claimant from the rolls was adhered to.

From said action of rejection, claimant appealed March 31, 1888, contending that the preponderance of the evidence fully established the origin and incurrence of his said alleged disability in the service and line of duty, and that his claim had been prejudiced by the bias against him of one of the special examiners who had investigated it.

OPINION.

The appellant in this case seeks a restoration to the pension rolls on the ground that the disability for which he was originally pensioned, namely, chronic rheumatism and results, has been clearly proved by the weight and preponderance of the testimony to have originated in the service and in line of duty. He states in the course of his examination before the special examiner that he abandons all claim for pension on the ground of disability resulting from chronic diarrhea, deafness, and disease of heart, which he had formerly alleged as a basis for increase of pension in prior affidavits; and he bases his claim for restoration at the present time upon the sole disability of chronic rheumatism and the resulting deformity of hands and fingers. Were this claim to depend alone for its decision upon the sworn testimony presented in the affidavits filed in support of the claim and upon the deposition of witnesses taken upon the special examinations, it might be difficult to determine whether the appellant should be restored to the rolls or the adverse action of your office sustained. The testimony is conflicting in the extreme. A number of witnesses of equal credibility and with equal opportunities of observation and facilities for learning the physical condition of the appellant prior to his enlistment swear positively and directly on both sides of the case, and are diametrically opposed to one another.

On the one hand, the surgeon of appellant's regiment, who is now dead, testifies in several affidavits positively to the incurrence of rheumatic fever by the appellant in February, 1864, and to appellant's treatment therefor, saying that it resulted in the distortion of hands, as alleged by appellant and for which he is rated. The surgeon further states that he was acquainted with the appellant prior to his enlistment; that he examined him carefully at the time of enlistment in his second service, when he was a sound man; that he examined him at the time of his discharge, and recommended his discharge from the service; that he saw *him shortly after his* discharge and treated him for said disability, and *continued so to treat* him from time to time down to the year 1871.

The captain who first commanded appellant's company in his second service in the First Maine Heavy Artillery, in which the said disability is alleged to have been incurred, testifies that he was detailed by the commanding officer of said regiment to select the men to form Company L of said regiment from a large number of recruits; that he was careful, in making said selection, to choose the strongest and most able-bodied men from said number; that he required each man to handle a gun before selecting him; that he had frequently drilled appellant while a member of said company during the time he commanded it; and he swears positively that appellant's hands were *not* distorted or deformed at the time when he enlisted in said company.

The first sergeant of said company testifies before the special examiners that he had known appellant prior to enlistment and had worked with him; that he had been thrown into intimate association with him during his second service in Company L, First Maine Heavy Artillery, and drilled him in the manual of arms, and, while so doing, had often had occasion to take hold of his hands and place them in the proper position upon his musket; that it would have been impossible for appellant to have had deformed and distorted hands at that time without his having observed it, and that, so far as he was able to discover, appellant's hands were perfectly sound. He gave the same account with reference to the incurrence of the injury and the circumstances connected therewith as the appellant and the captain of his company.

Assistant Surgeon Lincoln, of appellant's regiment, also testified before the special examiners that he was one of a board of surgeons who examined the members of Company L, First Maine Heavy Artillery, upon their enlistment and enrollment in the service; that said examination was careful and thorough in all particulars; that while he does not remember appellant particularly, yet, he is confident that appellant could not have been afflicted with rheumatism to such an extent as to distort or seriously affect his hands at that time without its being discovered, and that appellant was passed at said examination as a sound and perfectly healthy man, and so received into the service.

The lieutenant of appellant's company, in his first service, testifies that he enlisted at the same time with appellant in Company I, Twenty-eighth Maine Volunteers; that he was examined for enrollment at the same time and in the same room with appellant; that they were stripped and examined by the surgeons, together, and both accepted as sound, able-bodied men; that at that time there was nothing the matter with appellant's hands, nor was there during the whole time of appellant's service in said company, and up to the time of his discharge from the said service in August, 1863; that he had frequently drilled the appellant in the manual of arms during his first service, had witnessed him, as a sergeant in said company, drill squads of men, and had never *observed anything wrong* with his hands, which he would have done

had they been deformed or distorted in any way; and he is positive that appellant was sound in that particular during the whole time of said service; that appellant was not sick or disabled in any manner during said service, except on one occasion near New Orleans, La., when he was sick for a short time with chills and chronic diarrhea, from which he recovered, subsequently serving with his company until it was mustered out of service. In this he is completely corroborated by the testimony of four or five of appellant's comrades in his first service, who testify that they were his tent-mates, slept with him, ate with him, drilled with him, and who are positive that he had no deformity of the hands, nor rheumatism, nor any other disease or disability during said first service than that above mentioned.

In addition to the above, thirty-four witnesses, a majority of whom testify that they have been acquainted with appellant for thirty or forty years—some of them from infancy—swear that they have played with appellant as boys and school-mates, have lived with him in the same house, have eaten with him at the same table, have worked with him at the same machines, sawing laths, in the same mills, and have had every opportunity that it was possible to imagine for observing apellant, but had never observed any deformity of his hands nor any distortion of his fingers and joints prior to enlistment; they state that he was a sound and healthy man, and, so far as they knew or heard, had never been afflicted with either rheumatism or rheumatic fever. A majority of the witnessess also state positively that, during the years immediately preceding appellant's first enlistment, and during the period that intervened between his first and second enlistments, he was engaged in labor and in mechanical pursuits, which it would have been impossible for him to do, had he been afflicted with rheumatism to such an extent as to distort and deform his hands.

On the other hand, fourteen witnesses of apparently equal credibility with those above-mentioned, and with as ample opportunities for knowing the physical condition of appellant prior to his enlistment, swear positively, distinctly, and emphatically that appellant was afflicted with rheumatic fever when about fifteen or sixteen years of age; that his hands were distorted and deformed as a result of said fever long prior to the war, to almost as great an extent as at the present time, and that the appellant's condition, so far as his hands were concerned at the time of his discharge from the Army, was about the same as it had been previous to his first enlistment. Some of these witnesses state that they assisted in caring for and nursing appellant during said spell of rheumatic fever; that they assisted in dressing his hands with liniment and wrapping them in cloths; that they had taken his hands in theirs and examined them critically, and that they were distorted and deformed to a less degree, but in the same manner as at the present time.

Under these circumstances, with a conflict of testimony such as is presented here, it would be difficult—as it always is in cases depending

upon human evidence, where persons of equal credibility testify to diametrically opposite facts—to arrive at a correct solution of the question, or to decide the claim according to justice and right, were we to take only the sworn verbal testimony for evidence in the case. But it is to the record that we must look for a proper solution of this question, and the record of the appellant's service in the Army fully and completely corroborates his statements and those of the witnesses who testify in favor of his claim.

In the first place, we have the record of his service as a member of Company I, Twenty-eighth Maine Volunteers, for nine months, in which it appears that he was present for duty, with the exception of a short period in January and in February, 1863, and that he was mustered out and honorably discharged from the service at the end of the term with the indorsement, "No reason being known why he should not re-enlist." Said record of his first service is absolutely silent as to the disability of rheumatism, and, while the nature of the sickness therein mentioned is not stated, the subsequent testimony clearly establishes the fact that it was an attack of chills and chronic diarrhea. This record makes the presumption almost conclusive that appellant was a sound man prior to and during his first enlistment and up to the time of his discharge from said service, and corroborates fully the statements of the numerous witnesses who swear that appellant, prior to the war, was a sound, rugged, and healthy man, afflicted with no deformity of hands nor of any portion of his body.

In the record of appellant's second service, we find him accepted and enrolled as a private in Company L, First Maine Heavy Artillery, on December 24, 1863, and, immediately afterward, we find him rated as a sergeant in said company, a promotion from the ranks, which was unlikely in the case of a man who was deformed or afflicted in a manner which would prevent his performing properly the duties of a soldier. Again, it is shown by the Surgeon-General's report that, in March, 1864, he was sick with rheumatism, and on the following May was admitted to hospital near this city with chronic rheumatism; that he was transferred with the same disease, first, to a hospital at Chester, Pa., and then to Augusta, Me., and was returned to his regiment in November, 1864, as fit for duty, and on the following January was discharged from the service upon a certificate of disability for the same cause. Here the record completely corroborates and sustains the appellant's statements and those of his surgeon, of his captain, of his first sergeant, and of his comrades, as to the incurrence, the continuance, and the final result of his said disability, so far as his service in the Army was concerned—the statements of the record showing that, in March, he was reported as disabled from rheumatism, and that in the following May, and subsequently, it had assumed a chronic form, bearing out the statements of these witnesses in consistency with the present condition of appellant. The hospital record of appellant in his second service must be held, in accordance

with the decisions of the Department, as raising the presumption that it is correct; that it shows all the diseases and all the treatment which claimant had during his Army service. It is further to be presumed that he was not treated for any disease other than those stated, and "this presumption will obtain until the contrary is clearly and satisfactorily established by competent evidence." (See case of Luther Ellis, 1 P. D., page 387 and decisions therein cited.)

But, more than this, appellant was discharged from the service upon a certificate of disability which distinctly and emphatically states that he was unfit to perform the duties of a soldier on account of rheumatism contracted in the service and in line of duty, and this statement is made by a captain in command of his company and by the surgeon in charge of his regiment.

The Department has held with great emphasis, in a large number of decisions, that the statements contained in the certificate of disability upon which the soldier was discharged from the service shall be taken as fully establishing the facts therein stated, unless fraud or mistake be apparent from the face of the certificate itself, or clearly established by the most positive and conclusive evidence. (See case of Luther, Ellis, *supra*).

So far from the statements of the above certificate being in any degree or in any manner controverted or weakened by the evidence in this case, they are strongly corroborated by the above mentioned evidence of the captain of appellant's company, of the surgeon, of one of the assistant surgeons of his regiment, of the first sergeant of said company, and of numerous comrades; and there is not a particle of testimony presented in the case tending to show mistake or fraud in connection with the issuance of said certificate or with the statements therein contained.

Under these circumstances it is evident that, in accordance with the decisions of the Department as to the weight which should be given to a contemporaneous official record, such as this certificate of disability, "it must be taken as fully establishing the facts therein stated," namely, that the disability for which the applicant was originally pensioned was contracted in the service and in line of duty, and more especially when said statements are borne out and fully and completely sustained by the great preponderance of the sworn testimony in the case.

The Department is therefore clearly of the opinion that your action dropping the name of appellant from the pension rolls on the ground that the disability for which he was pensioned had existed prior to enlistment was error, and it is reversed.

You are therefore requested to restore the name of Joseph D. Sawyer to the pension rolls and to rate his pension in accordance with the degree of disability shown to exist.

CAUSE OF DEATH—ALTERCATIONS

MARY A., WIDOW OF STEPHEN COMPTON.

An injury, incurred in a scuffle with a comrade in barracks and causing soldier's death, does not give title to pension, inasmuch as said injury is not due to the line of duty. The Department re-affirms the doctrine that "the cause of disability or of death must in some manner pertain to and have a natural and logical connection with the military service and line of duty in said service," and disabilities originating in personal altercations sustain no such connection.

Assistant Secretary Hawkins to the Commissioner of Pensions, June 28, 1888.

Herewith are returned the papers which accompanied your report of June 23, 1888, upon the appeal of Mary A. Compton, widow of Stephen Compton, deceased, late private Company B, Eleventh Indiana Volunteers, from your action rejecting her claim for pension.

Soldier enlisted March 13, 1865, and was mustered out of the service with his company, July 26, 1865.

The records of the War Department furnish no evidence of any disability or injury incurred by the soldier during his army service. He died, June 23, 1875, of nephritis, without having filed an application for pension.

Claimant filed a declaration for pension, as widow of soldier, January 21, 1884, alleging therein as the basis of her claim that the soldier received an injury to his side while in the service at the Relay House, Maryland, which resulted in his death.

Her claim was rejected July 9, 1887, upon the ground that, after a special examination, the evidence fails to show the incurrence of any disability in service and line of duty to which soldier's death could be ascribed.

From said action of rejection, claimant appealed June 14, 1888, contending that said action was hasty and taken before she had an opportunity to obtain the evidence of witnesses, and that she believes that she would be able to establish beyond doubt the fact that the injury the soldier received was incurred in the service of the United States, and that said injury was the immediate cause of the soldier's death, had she an opportunity given her to do so.

OPINION.

It is apparent, from an examination of the papers in this claim that it has been carefully and duly considered upon its adjudication by your office, and subjected to an exhaustive special investigation for the purpose of obtaining all the evidence possible bearing upon the facts alleged, and that the contention of appellant's appeal is without foundation.

The claim is based upon the allegation that the soldier received in the service an injury to which his death is ascribed by appellant. The evi-

dence obtained upon the special examination develops the fact that the soldier received no injury during his army service except a bruise upon his left side, which was incurred in a scuffle with a comrade in barracks near Baltimore, Md., shortly before his discharge. There is no evidence of any serious disability resulting from said bruise, nor any medical evidence showing the existence of any serious disease of the soldier, prior to the year 1874, when he appears to have been treated for malarial fever, pulmonary consumption, and disease of liver and kidneys; and the physician who attended him in his last illness states that the immediate cause of his death was nephritis. No connection is satisfactorily established between said alleged injury and the cause of his death, nor does it appear from the evidence that soldier suffered any appreciable degree of inconvenience from said injury after the date of his discharge.

But admitting, for the sake of the argument, that the alleged injury in the service resulted in the death of the soldier as contended by appellant, it is evident that said injury was not incurred in the line of duty, so as to give title to pension as construed and held by the Department.

In the leading case of Ammerman, Wm. M. (vol. 1, P. D., p. 5), it was held that "the cause of disability or of death giving title to pension must in some manner pertain to and have a natural and logical connection with the military service and line of duty in said service." (See also, to the same effect, Jones, Wm., *id.*, p. 87; Wagoner, Carroll *id.*, p. 338.)

The above is the settled rule of the Department, and has been held without variation in a long line of decisions, and it is apparent, from the circumstances surrounding the incurrence of the alleged injury by the soldier, that it applies directly to this claim, and is conclusive against the title of appellant to pension upon the grounds on which she bases her claim.

Your action of rejection is therefore affirmed.

ATTORNEYS' FEES.

CLAIM OF CHARLES AND WILLIAM B. KING.

Where a pensioner has filed through his attorney at different periods two distinct claims for increase of pension and, the Bureau of Pensions having considered the first claim, no effort is made to have it reconsidered, the Department holds that whatever payment the pensioner may have made to his attorney for the prosecution of the first claim can not be properly deducted from the legal fee of $10 for the prosecution of the second or latter claim for increase of pension.

Assistant Secretary Hawkins to the Commissioner of Pensions, June 14, 1888.

Herewith are returned the papers which accompanied your report of *the 14th of April*, 1888, upon the appeal of Charles and William B. King,

of this city, from the action of your office in the matter of their fee for the prosecution of the claim of Adam Caughman, who was a private, Company H, One hundred and seventh Pennsylvania Volunteers, for increase of pension, certificate No. 143234.

On the 26th of January, 1881, Mr. Caughman filed a declaration for increase of pension, alleging an increase of disability from the causes for which the pension was originally granted. Charles and George A. King were appointed attorneys in this claim. The claim was rejected on the 2d of February, 1882.

On the 26th of January, 1835, Mr. Caughman made another application for increase of pension, alleging, as before, an increase of disability from the causes on account of which the pension was originally granted. In this claim, Charles and William B. King were appointed attorneys. This claim was allowed, the increase of pension dating from the 7th of May, 1885, the date of the medical certificate made under the pending application. At the time of the issue of the new certificate, June 6, 1885, an order was issued for the payment to the appellants of a fee of $10. It appears that the pensioner presented to the agent for paying pensions an affidavit setting forth that he had paid his attorneys $4 on account of their fee. The pension agent thereupon paid the appellants the sum of $6. The attorneys acknowledge that the pensioner paid to them, in 1881, $4 as part of their fee for the prosecution of the claim filed on the 26th of January, 1881. At the time referred to the fee of an attorney was not contingent upon the successful prosecution of a claim, and the payment of it was a matter between the claimant and his attorney, the law merely restricting the amount.

The appellants contend that, although the claim made in 1881 was rejected, they were entitled to the amount they received as a part of their fee in that claim, and therefore that no deduction should be made from the fee of $10 for the prosecution of the claim filed in 1885.

It appears to the Department that the claim for increase of pension, made in 1881, must be regarded as having been finally disposed of, as it was rejected in February, 1882, and no effort was made to have it reconsidered. If the pensioner in 1881 paid $4 on account of the fee in that case, it is a matter with which the Pension Office and the Department have nothing to do. The law then in force made the payment of a fee, within the limit of $10, a matter to be settled between the claimant and the attorney, without any interference from the Government.

The claim filed on the 26th of January, 1885, must be regarded as a separate and distinct claim from that filed in 1881. Any payment made by the claimant in the former case can not properly be deducted from the legal fee for the prosecution of the latter.

You will please direct that the payment of the fee of the attorneys in the claim filed in January, 1885, be made in accordance with the views herein set forth.

ATTORNEYS' FEE.

CLAIM OF MILO B. STEVENS & CO.

Where increase of pension is granted on account of the same disability for which the soldier was originally pensioned, and there appear to have been involved in attorneys' service no extraordinary "trouble and difficulty," said attorneys should not be allowed a fee to exceed $10, inasmuch as the law provides that "no greater fee than $10 shall be demanded, received, or allowed in any claim for increase of pension on account of the increase of the disability for which the pension had been allowed."

Assistant Secretary Hawkins to the Commissioner of Pensions, June 14, 1888.

Herewith are returned the papers which accompanied your report of the 24th of April, 1888, upon the appeal of Milo B. Stevens & Co. from the action of your office denying them a fee in excess of $10 on the issue, dated June 1, 1887, of pension certificate No. 240863, in favor of Absalom F. Kagley, who was a private, Company H, Second Tennessee Cavalry Volunteers.

The said Absalom F. Kagley was originally pensioned by certificate issued June 5, 1883, at the rate of $2 per month, on account of disability from an injury to the head.

On the 2d of November, 1885, he filed a declaration in which he claimed "additional pension on account of epilepsy, which has resulted from the wound of the head, and which first attacked him about the close of the war."

In this claim, Milo B. Stevens & Co. were attorneys and filed a contract for a fee of $25. This claim was rejected on the 13th of March, 1886.

On the 7th of August, 1886, Mr. Kagley filed another declaration, in which he claimed increase of pension on account of loss of hearing and of sight, and erysipelas, the result of the injury for which he was pensioned. In this claim, Messrs. Milo B. Stevens & Co. were appointed attorneys. It is probable that, in the declaration filed August 7, 1886, it was the intention to claim on account of epilepsy instead of erysipelas. A supplemental affidavit of the applicant and the medical testimony subsequently filed refer to epilepsy. The appellants prosecuted the claim, and on the 1st of June, 1887, a certificate was issued increasing the pension to $6 per month on account of disability from injury to the head and resulting epilepsy. A fee of $10 was paid to the appellants. They state in the appeal that, "under date of June 27, 1887, we requested the Commissioner of Pensions to apply the fee agreement on the ground that the case proved to be one of difficulty and trouble and that therefore the full contract fee was equitably due us."

The report of your office upon the appeal sets forth that "as the re*cords fail to show* that the claim was one of such difficulty and trouble

as would justify the certification of a fee in excess of $10, as provided in section 4 of said act of July 4, 1884, the action of this Bureau in certifying a fee of only $10 is not error."

It appears to this Department that, in this case, no greater fee than $10 could under any circumstances be allowed. It is not a claim for increase of pension on account of a new disability, but on account of an increase of the disability from the injury on account of which the pension was originally allowed. No new and distinct cause of disability was alleged in the application to which this appeal relates. The increase of pension was allowed on account of an increase of the disability resulting from the cause on account of which the pension was in the first place allowed. The law provides that no greater fee than $10 shall be demanded, received, or allowed "in any claim for increase of pension on account of the increase of the disability for which the pension had been allowed."

The action of your office refusing to allow a fee greater than $10 is approved, for the reasons herein stated.

PATHOLOGICAL SEQUENCES—MEDICAL TESTIMONY.

MARY F., WIDOW OF GEORGE F. SPILMAN.

The Department holds that, in determining the cause of a soldier's death from disease, the opinion of the medical referee, defining the pathological relation of said disease to the *origin* of soldier's pensionable disability in the service, is generally conclusive "in the absence of evidence showing a mistake or error upon his part."

Assistant Secretary Hawkins to the Commissioner of Pensions, June 15, 1888.

Herewith are returned the papers which accompanied your report of June 9, 1888, upon the appeal of Mary F. Spilman, widow of George F. Spilman, deceased, late captain and commissary of subsistence, United States Volunteers.

The records of the War Department show that the soldier was commissioned as captain and commissary of subsistence of volunteers, June 10, 1862, and was honorably discharged from the service as such, July 19, 1865. They furnish no evidence of any injury or disability incurred by the soldier during his army service.

Claimant filed her original declaration June 29, 1871, alleging therein, as the basis of her claim, that the soldier died on or about March 14, 1866, of rupture contracted by having been thrown from a horse while in the line of duty in the United States service, and claiming a pension as his widow.

In a subsequent affidavit, filed September 30, 1872, she alleged that, on *or about November 10, 1864*, the soldier was thrown from a horse

and severely injured while in the performance of his military duty; that he never recovered from the effects of said injury; that in view of that fact she was under the impression that he had died from the effects of said injury; that he was also affected with chronic diarrhea for several months previous to his death, but this she did not consider necessary to mention in her former declaration, presuming that the injury he had received from the fall from the horse was the actual cause of his death; that he was in feeble health and disabled just prior to his discharge from the service from over-exertion and exposure in the performance of his duty, and that his feebleness and disability continued to the time of his death, which occurred March 14, 1866.

Upon the adjudication of said claim by your Bureau, claimant was granted a pension at $20 per month from June 11, 1872, as the widow of the soldier. On September 24, 1873, she was allowed an increase on account of the children under sixteen years of age, left by the soldier; and, on September 19, 1879, she was paid arrears of pension at $20 per month from March 15, 1866, the alleged date of the soldier's death, to the time at which the pension originally commenced.

Upon representations made to your Bureau that the officer's death was not due to his military service, the case was re-opened and sent to the field for special examination.

After a thorough and exhaustive special investigation of the merits of the claim, during which the claimant was permitted to be present, to be assisted by her attorney, and to call and examine such witnesses as she chose, she was dropped from the rolls, August 27, 1884, upon the ground that the evidence showed that the soldier's death cause was *not* due to his military service, but was the result of excessive use of alcohol.

Subsequent to said action, dropping her from the rolls, she filed some additional testimony and asked that her pension be restored. After due consideration of said newly filed testimony, in connection with the other evidence in the case, your Bureau adhered to said action of dropping, for the reason that the said new testimony was not deemed sufficient to warrant a reconsideration of the claim.

From said action claimant appealed May 23, 1888, contending that said decision was contrary to the weight of evidence on file, and that due force and effect has not been given to the testimony filed since the date of dropping.

OPINION.

Appellant bases her claim for a pension upon the allegation that the soldier, while in service and line of duty, was ruptured by a fall from a horse which he was riding; that while so employed he contracted chronic diarrhea; that the disability from said causes, combined, continued subsequent to discharge, and that his death resulted therefrom.

The testimony obtained upon the special examination of the claim

shows that the soldier died suddenly at Greensburgh, Ky., March 14, 1867, and that no inquest or *post-mortem* examination was had.

It is apparent from the evidence, and in fact beyond dispute, that the appellant received a pension for one year before the officer died, granted upon the testimony of herself and her witnesses that his death occurred one year earlier than it actually did.

A careful review of the testimony taken upon said special examination, as well as that filed by the appellant, shows that there is no testimony from any person having any personal knowledge of the fact that the officer was ruptured or received any other injury during his army service, nor is there any evidence of the existence of a rupture at the time of either his discharge or his death.

The testimony of the witnesses who swear that the officer contracted chronic diarrhea in service shows that they had no personal knowledge of the facts to which they testified, but based their testimony merely upon the statements of others, which, being no better than hearsay, can not be accepted as sufficient to prove the incurrence of said disease in the service. There is some testimony on file that at some time subsequent to discharge the soldier had chronic diarrhea, but it is most indefinite and unsatisfactory, and is clearly not sufficient to connect said attack of chronic diarrhea with the soldier's army service, or to prove that his death resulted therefrom. It is clearly shown by the evidence of the witnesses who were examined upon the special investigation of the claim that the soldier was habitually addicted to the excessive use of both alcoholic liquors and opiates.

Pending the investigation of the claim, it was referred to the medical referee of your Bureau for an opinion, from a medical standpoint, as to the death cause of the soldier.

In response to such reference that officer expressed the opinion that soldier's death was due to alcoholism, and not to chronic diarrhea; nor was it the result of his military service.

Pending this appeal, the claim was again referred to the medical referee for his opinion upon the same point, and, in an opinion dated June 2, 1888, that officer states: "After a careful review of all the evidence in the case the action taken by the medical division May 29, 1884, is believed to be correct and is concurred in."

The above question, propounded to the medical referee, was one purely of pathological sequence, the decision of which falls directly within the province of that officer. The Department has universally held upon all such questions that it will be governed by the opinion of the medical referee in the absence of any evidence showing mistake or error upon his part; and, as no such condition of affairs is shown to exist in this claim, the Department, for the reasons hereinbefore stated, is clearly of the opinion that your action in refusing to restore the appellant to the pension *rolls* wasn ot error, and it is, therefore, affirmed.

TOTAL BLINDNESS—ORAL EVIDENCE OF ORIGIN.

JAMES EDWARDS (COLORED).

In a claim of pension for "total blindness," the continuous service of claimant for about twenty months being established, there being no evidence of disease of eyes, nor of impaired vision prior to or at enlistment, the claimant's captain and several of his comrades testifying orally, from personal knowledge of the incurrence, alleging a specific cause, and the continuous existence of said disease in the service; competent witnesses also testifying from personal knowledge, in connection with medical treatment, to the continuance of the disease at and for years subsequent to discharge, and to the culmination of the same in total blindness: it is *held* that such oral evidence is ample to prove the origin and the nature of claimant's disability, in the absence of all record evidence in the service, and it will be accepted as establishing claimant's declaration, any merely theoretical cause, if alleged to defeat the claim, being regarded as not only speculative, but as an insufficient rebuttal of the obvious facts in the case.

Assistant Secretary Hawkins to the Commissioner of Pensions, July 19, 1888.

I herewith return to you the papers which accompanied the appeal of James Edwards, late of Company H, Second United States Cavalry (colored), from the action of your office rejecting his claim for invalid pension No. 425485.

The basis of this claim is total blindness, alleged to have been incurred by claimant whilst in the service and line of duty with his regiment in Texas, about September, 1865.

The records show that claimant was enrolled February 1, 1864, and that, from that date, he reported for duty to December 31, 1865. He was mustered out of the service with his company, February 12, 1886, at Brazos, Santiago, Texas, as sergeant, he having been promoted to the rank of sergeant January 20, 1865. There is no record of claimant's alleged disability, in the office of the Surgeon-General; but that officer reports that there are no records of claimant's regiment prior to January 1, 1866.

The claim was rejected by the Bureau of Pensions, April 19, 1888, upon the ground of claimant's "inability, aided by special examinations, to prove total blindness, which came in 1879, in any manner due to his military service."

From this action of the Bureau of Pensions the appeal is taken.

OPINION.

A review of the papers which accompany this appeal leads me to the conclusion that the ground upon which the claim for pension was rejected, April 19, 1888, is not warranted by the evidence, but that, on the contrary, said evidence satisfactorily establishes claimant's title, as *set forth in his declaration*; and, in returning the papers to you, I re-

spectfully dissent from and overrule your action, for the reasons which follow:

The claimant alleges that his present disability—total blindness—is the result of causes that originated in the service, said causes being ascribed to exposure which produced a severe "spell of break-bone or salt fever," which he contracted whilst on duty with his regiment at Brazos, Texas, in the fall of 1865. The report of the Surgeon-General's Office shows that the existing records of claimant's regiment do not go back further than January 1, 1866, and, therefore, there being no record evidence relating to the alleged incurrence of claimant's disability in the service, we must rely, for the facts, upon the oral testimony of competent witnesses. The only records that accompany the claim are those of the War Department, which represent claimant as reporting for duty from February 1, 1864, to December 31, 1865—twenty-three months. There is no report concerning him in the line of duty from December 31, 1865, to February 12, 1866, when, as a sergeant, he was discharged from the service, with his company, at Brazos, Texas.

The accompanying papers are devoid of evidence tending to show that claimant was in any degree or manner unsound at the date of his enlistment, or that his alleged disability was due to any cause that existed prior to his entrance into the service; but the evidence shows that he was on *active* duty, free from any apparent disability, for at least eighteen months subsequent to his enlistment, viz, from February 1, 1864, to about September, 1865, when, as alleged, he was attacked by a spell of "fever," to which is traced the origin of his present disability—total and permanent blindness.

First in importance is the testimony of James C. Toy, the captain of claimant's company, who, in April, 1886, testified that claimant, "while at Clarksville,* Tex., about September, 1865, had a severe spell of break-bone or salt fever, which so affected his eyes that he had to be led about and was blind; that, when discharged, claimant "had recovered so as to see a little by use of spectacles." Testifying, subsequently, before Special Examiner Grafton Tyler, Captain Toy said that claimant "was his orderly sergeant," and that "he had at Clarksville, (?) Tex., what the doctors called break-bone or salt fever;" that he was "down sick in camp a long time with it, under Dr. M. M. Manley, surgeon, now deceased;" that "his sickness affected his eyes," and "when he recovered and came to the company he wore green glasses and was never without glasses afterwards; even when discharged he had to be led aboard the steamer. It was the fall of 1865 when he was first taken sick."

The testimony given October, 1886, by John W. Parker and George Upsher (comrades of claimant), is to the effect that while at Clarksville, Texas, in September, 1865, claimant "contracted disease of eyes from a spell of sickness called salt-fever," and they "know that, afterwards,

*Evidently *Brownsville*, located a few miles west of Brazos.

he was totally blind at night;" they "attended claimant part of the time while he was sick."

Before Special Examiner W. J. Brooks, at Baltimore, the aforesaid Upsher testifies that claimant "complained in Texas that he was blind at night;" he "seemed to be all right in the day-time; noticed that, when he spoke about it, his eyes had a white skim over them, and noticed that at night he had to be led out of his tent, but not so in day-time. Dr. Manley gave him some powder and liquid for his eyes. Heard Dr. Manley say that he (claimant) was blind and thought it came from the moon. He seemed to get better after the doctor attended him. Affiant came here (Baltimore) in 1866, immediately after discharge; saw claimant two or three times a week; he (claimant) still complained of his eyes; said they were getting worse; can't say whether there was any skim over them, as he did not examine his eyes."

The testimony of John W. Parker (comrade, as aforesaid) before Special Examiner Brooks is corroborative of the foregoing evidence of George Upsher as to the origin of claimant's disability in the service. Parker states that he took claimant to Dr. Manley, the surgeon in service; "had to lead him, and for two days he (claimant) could only tell affiant by his voice. It was the same both day and night." Upsher adds: Claimant "seemed to get better, but always complained of his eyes hurting him, and could hardly see at times, the same both day and night, but continued to do duty; was orderly sergeant; had nothing to do but call the roll. When discharged affiant returned to Pungoteague, Va., where he lived (soldier—claimant—also lived near Drummondtown, same county, prior to enlistment); saw soldier (claimant) a couple of times at Pungoteague, Va., and he complained of his eyes; noticed that they both looked skimmy."

The testimony of Henry P. Waters, of Baltimore, before Special Examiner Brooks contains several important statements going to show the existence of claimant's disability shortly after his discharge from the service. Waters was a comrade in the Texas service, though not in claimant's company, and a fellow-workman with claimant in Baltimore. He states that he knew claimant as a sound man before the war and prior to claimant's enlistment. He knew nothing of his disability in the service, and says:

> After I saw him (claimant) on the field I never saw him again until I came here (Baltimore), after discharge in 1866. He (claimant) was working as a "stevedore" around the wharf. I worked with him for about two years at the wharf. His health was generally good at that time, so far as I could observe. But he had some trouble with both his eyes, as he used to wear green glasses, sometimes for a couple of months at a time, and then he would lay them off for a while. I don't know what was the matter with them.

Again, the same witness, in the same deposition, testifies before the special examiner, saying:

> *Then, about 1868,* I went in the brick-yard and saw him (claimant) when I was *not able to work.* I worked in the brick-yard five or six years. During that time I

saw him on an average of once a month. During part of that time he drove for the Ericson Steam-boat Company. I used to meet him then. His eyes appeared to grow worse. The way I perceived it was that he would sight things, that is, he would not walk square up to any object—sighted it sideways, as though he did not exactly see the object; and he told me his eyes were getting worse.

Relating to the increasing degree of claimant's impaired vision from 1867 to 1881 and to his subsequent blindness, Joshua R. Brown (a barber), of Baltimore, testified before Special Examiner Brooks, saying:

He (affiant) first knew appellant in 1867. He always came to affiant's shop to get shaved, once and sometimes twice a week until about six years ago (1881), when he became totally blind. When he first came there was nothing the matter with his eyes that he (affiant) could notice, and never heard him complain until shortly before he became blind—less than a year before. When he (claimant) first complained to affiant, he looked into them (his eyes) for hairs or something like that, but could never see anything in them; they looked perfect; looked in his eyes several times; he would stop as he was driving by with his dray and have affiant examine his eyes, and he (affiant) finally advised him to go to Dr. Chisholm; and he soon became blind.

The records of the Presbyterian Eye, Ear, and Throat Charity Hospital, Baltimore, Md., show that claimant entered that hospital December 3, 1878; diagnosis, "white atrophy; both discs pale; has smoked excessively; sight very much reduced."

The following statement, questions and answers, are quoted from the deposition made by Dr. E. Oliver Belt, of the "Presbyterian Eye, Ear, and Throat Charity Hospital," Baltimore, January 5, 1888, showing the nature and cause of claimant's disability:

After making an examination of James Edwards to-day, I diagnose his case as white atrophy, and I also think he has *locomotor ataxia*, which we have nothing to do with.

Q. Are there any symptoms which would cause you to believe that the present condition of claimant's eyes was in any degree due to syphilitic origin?—A. No sir; nothing that I could see would lead me to think so.

Q. Do the symptoms exhibited cause you to believe or attribute his present sightless condition as being due to excessive smoking?—A. No sir; they do not.

John Bloxam, a laborer, who knew claimant prior to his enlistment in Virginia, testified before Special Examiner Brooks, in Baltimore, saying that he saw claimant about a month after his (claimant's) discharge from the service, adding:

When I first met him here I asked him how he had been, and he said that he had had trouble with his eyes; that his sight had left him at night while in Texas. I worked with him about 1872, driving dray, while he was working for Chris. Harbaugh, and before 1872 and since. I saw him on an average of two or three times a week, and during that time he complained of his eyes being weak, but that the left eye was worse, and I used to bind tea leaves on his eyes at night for him. I used to say to him that I thought he was "going blind sure enough," and he replied that he thought he was, etc.

The testimony of John Taylor, of Baltimore, before Special Examiner Brooks contains the following statement:

Claimant came right to my house after he came home from the Army. I think I was the first one he lived *with here*. He stayed with me about six years. When he first *came to live with me he* complained to me that he could not see well to read at night.

The whole time he lived with me, which was up to about 1873, he complained of his eyes more and more; but, as I was not with him much in day-time, I noticed him complaining more at night.

In addition to the affidavit and deposition heretofore mentioned, Capt. James C. Toy, who was captain of claimant's company, made a statement before Special Examiner Tyler as late as February 10, 1888. In answer to the question, Do you remember any sickness James Edwards had in the service? Captain Toy said:

Nothing except, at Clarksville, Tex., he had what the doctor called break-bone or salt fever. He was down sick in camp a long time with it, under Dr. M. M. Manley, our surgeon, now dead. I do not think he was ever in any hospital except regimental hospital. This sickness affected his eyes. When he got over his sickness and came to the company for duty he wore green glasses, and was never without those glasses afterwards; even when discharged at New Orleans, La., he had to be led aboard the steamer. I think it was the fall of the year 1865 he was first taken with this sickness. Before he got sick his eyes were all right. I never knew him to have a day's sickness until he got that fever. I have not seen him since we parted in New Orleans, La., at discharge, and all I know of him is he wrote me asking for an affidavit, which I gave him. This sickness, I suppose, was brought on from exposure and bad diet in Texas. I never heard or knew or suspected he had any venereal disease. He was one of the most manly and polite men we had in our company; good habits in every way.

The statement made to the special examiner, Brooks, by Revel Garrison (a comrade of claimant) is corroborative of the foregoing testimony of Captain Toy, and of comrades Parker, Waters, and Upsher as to the origin of claimant's disability. Recalling his knowledge of claimant in the service, though somewhat indefinite in his recollection, Garrison said:

Now, I think he (claimant) did have some trouble with his eyes down in Texas, but can't remember the nature of the trouble, or where we were laying at the time, or what year that was.

I find, upon reviewing the depositions in the accompanying papers, that the only negative testimony that they contain is that of Nancy Pruit (whose maiden name was Benedick) and Lewis Bailey, the husband of Sarah Bailey, who was also a Benedick. These witnesses testify substantially that they never knew claimant's eyes were affected when he returned from the service. Nancy Pruit had been claimant's wife, but, for reasons not stated, they had ceased to live together; and Lewis Bailey was the husband of Sarah Bailey, the latter being a sister of Nancy Pruit. The negative testimony of such witnesses, thus connected by marriage and by blood, and obviously prejudiced, should not be accepted as seriously affecting the direct evidence of disinterested witnesses whose depositions are based upon personal knowledge of the origin and character of claimant's disability in the service, and of its continuance after discharge; and such negative testimony is, in fact, deemed of but little weight in the premises.

In this connection I recall the opinion of the two special examiners, N. T. Colby and W. J. Brooks, who investigated the merits of this claim *under specific instructions* from your office. These examiners, it is *true, are not witnesses*, but the opportunities which were presented to *them in the progress* of their work afforded them good grounds on

which to formulate conclusions as to the truthfulness of claimant's declaration. Mr. Colby, in reporting to the Commissioner the result of his investigation, said, "I believe the claim to be meritorious." Mr. Brooks, in his first report to the Commissioner, said, "I believe this a meritorious claim;" and, in his subsequent report made to the Commissioner January 14, 1888, he gave his estimate of the claim, after careful consideration, in the following terms:

In my opinion the testimony herewith submitted shows that claimant's eyes were affected immediately from date of discharge and have continued to grow worse until total blindness resulted about 1878, which does not appear to be due in any degree to any vicious habits, so far as I have been able to determine.

In view of the facts in the case, as indicated by the foregoing summary of evidence, I respectfully submit to you the following grounds as the basis on which rests the Department's reversal of the action of your office:

(1) There is no evidence in the accompanying papers tending to show that claimant's eyes were diseased or his sight impaired, or that he was in any manner or in any degree unsound, prior to or at the date of his enlistment in the service.

(2) The papers show that he was continuously on active duty for nearly twenty months subsequent to his enlistment, and that he was never sick but once, at which time he was afflicted with what the witnesses concur in denominating "break-bone or salt fever," in Texas.

(3) All the witnesses, including the captain of claimant's company, when testifying in regard to claimant's service, unite in ascribing his disability to the same cause, describing it as originating at the same time, and under the same circumstances, the slight variations in their testimony serving to strengthen rather than to weaken their main statements of fact.

(4) The testimony is conclusive as to the continuance from discharge of the injury or disease of claimant's eyes, which is attributed to the effects of exposure and to the spell of "fever" which claimant endured in the service; and it appears from the evidence, running through a series of years, that said injury or disease culminated in 1878 or 1879, in *total blindness*, for which pension is asked.

(5) There is no evidence in the accompanying papers to establish *any other* cause of claimant's blindness than that which is indicated by the foregoing testimony, and, therefore, any merely theoretical reason, if alleged to defeat the claim, must be regarded as purely speculative, *outside* of the evidence, and as not a satisfactory rebuttal of obvious facts in the case. The testimony in the papers offers a reasonable explanation of the origin as well as the nature of claimant's disability, tracing it to the line of duty in the service; and, in the absence of proof to the contrary, that explanation is accepted as correct.

Guided by these considerations, I sustain this appeal, and respectfully direct *that you cause* the name of claimant to be put on the roll

of pensioners for total blindness incurred in and by reason of the service, the pension to be fixed in accordance with the law which is applicable to the case.

DISABILITY SINCE DISCHARGE.

LEONHART MILLER.

Proof of the incurrence of a disability in the service and line of duty is not alone sufficient to entitle a claimant to pension, but the alleged disability must have existed in a *pensionable* degree, and such degree must be established by medical and other competent evidence as existing also since the date of claimant's discharge.

Assistant Secretary Hawkins to the Commissioner of Pensions, July 24, 1888.

I have considered the appeal of Leonhart Miller, late private Company G, Twenty-third Kentucky Volunteers (claim No. 156054), from your office decision of December 15, 1885, rejecting his application for pension upon the ground of insufficient testimony to show incurrence, and no disability in a pensionable degree being shown.

From this decision claimant appeals to this Department, June 23, 1888, alleging that his said "claim has been rejected by the Bureau of Pensions on the ground of insufficiency of testimony presented by him to said office tending to prove the origin of his alleged disability in the service and in line of duty; that said office erred in so holding, and that he hereby appeals his said case to the honorable Secretary of the Interior, and asks at his hands a thorough review of all the evidence presented to said Bureau in support of said claim."

Appellant assigns no specific error, nor does he allege that your office erred in deciding that the testimony failed to disclose that claimant was injured in a pensionable degree. All that claimant alleges in his appeal could be admitted, and yet claimant not be entitled to a pension, as, even assuming that the disability was incurred in the service and in line of duty, it must exist in a pensionable degree, and that degree must be established by medical examination, or claimant would not be entitled to pension. If, therefore, your decision was correct in holding that claimant was unable to show any "pensionable degree of disability existing from the alleged injury since the date of his service," it becomes immaterial to examine the testimony or to pass upon the question as to whether it did or did not prove incurrence.

Referring to the medical examinations, it appears that claimant was examined before an examining surgeon at Hamilton, Butler County, Ohio, January 1, 1874. The surgeon reports:

There is no physical change of structure visible, so no evidence of pain, except his word, and his reputation for veracity is not good. It is possible for his pain to really exist and to have originated as he alleged, but not very probable.

Claimant was again examined March 3, 1882, before the same surgeon, *who reports that*, in his opinion, "claimant is not seriously incapac-

itated," and that "his disability is not permanent." He further reports as follows:

Applicant claims to have pain in the lumbar region, especially before atmospheric changes, but there is no structural changes that indicate it. He claims that his pain is worse and he often has difficulty and bloody urine attended with profuse perspiration. His general appearance indicates vigorous health, wholly incompatible with blood in his urine. His leg is very slightly crooked from a fracture, since discharge. His manner of testifying does not impress me favorably in regard to his veracity.

Claimant's case was very thoroughly and carefully examined September 15, 1883, by Special Examiner Pickerell, who took the claimant before the Dayton board (Dayton, Ohio) September 19, 1883, where claimant was again examined with the following results:

Close, careful, and thorough examination fails to reveal any evidence of any rupture; the groins are both normal in appearance, the rings are natural to the touch, and there is no impulse on coughing. No disability. The shape and appearance of the spinal column is normal. Applicant alleges tenderness and pain on pressure over the spine and alongside of it in the lumbar region. Applicant can bend forward and touch his toes with his fingers without bending his knees. The general muscular development is good; the lower extremities are well developed; muscles solid and firm, and no indication of any loss of power or impairment of motion in them. General nervous condition good. No rating.

On the 11th of January, 1884, the then medical referee ordered an examination before the Cincinnati board, with special reference to, "first, injury of spine; second, disease of kidneys; third, left inguinal hernia;" he required the board to give careful description of claimant's general physical condition, also all symptoms of any trouble with spine from claimed injury, and enjoined a very careful examination. In accordance therewith, the claimant was examined January, 30, 1884, before the Cincinnati board, who report as follows:

(1) No curvature or injury of spine, or physical change detected. No rigidity of recto spine mass. No tenderness on pressure or percussion.

(2) Man complains of dysuria. Says he has to urinate sometimes every half hour. Examination with sound shows no stone in bladder, but prostate enlarged and very sensitive. Urine analysis shows Sp. Gr. 1020. No sugar; no albumen; no mucus acid re-action. Heat and acid test.

(3) No hernia detected; no impulse on coughing; no protrusion either side. Left side of scrotum 3¼ inches, to 3 inches right side. Testicles normal in size and full. Left cord one-half inch larger than right upon measurement. Penis normal.

Lung sounds clear. Heart's action normal. Nothing to indicate any result from former attack of measles.

Man has the appearance of too free use of stimulants.

From the condition and history of the claimant, it is our opinion the disability was not incurred in the service as claimed, and that it is not aggravated or protracted by vicious habits.

We find the disability as above described to entitle him to no rating.

From the foregoing medical examinations, it is apparent that your rejection of the claim for the second reason assigned, viz: no pensionable disability existing, was not error. Your decision is therefore affirmed, and the papers in the case accompanying your letter of transmittal of July 20, 1886, are herewith returned.

RE-RATING—RES ADJUDICATA.

GEORGE S. NEWTON.

The Department re-affirms the ruling that old cases, long since adjudicated by previous administrations, will not be re-opened, reconsidered, nor re-adjusted, except upon the presentation of "new and material evidence" tending to show the existence of a palpable error or mistake, and which, therefore, tends to change the real status of the claimant before the Department. Such cases are clearly within the rule of *res adjudicata*.

Assistant Secretary Hawkins to the Commissioner of Pensions, July 17, 1888.

Herewith are returned the papers which accompanied your report of July 11, 1888, upon the appeal of George S. Newton, late private, Company H, Second District of Columbia Volunteers, from your action rejecting his claim for a rerating of his pension.

Claimant enlisted January 31, 1862, and was discharged from the service September 12, 1865. He was pensioned November 12, 1887, at $4 per month, from September 13, 1865, the date of his discharge, for disability from fracture of the left clavicle. At the same date, former rejection of his claim for disability from injury to back and spine and kidneys, which had been affirmed on appeal, was adhered to.

Claimant filed the present declaration December 7, 1887, claiming a rerating on account of alleged anchylosis of shoulder joint, producing total disability of left arm, and, as alleged, existing from the date of original injury. In an affidavit filed February 27, 1888, in the nature of an amendment to, and explanatory of, said declaration, he alleged that the injury to shoulder, arm and side, and the fracture of rib were incurred at the same time as the fracture of clavicle, and were results of the same injury, and that, on account of the stiffness of his shoulder and lack of control of the left arm, he had lost the four fingers of his left hand. In the same affidavit he also set forth the alleged injury of back and disease of kidneys, which had been rejected.

Since the date of filing the aforesaid declaration, claimant was medically examined December 16, 1887, by the board of surgeons of the Pension Bureau, who rated him four-eighteenths for fracture of left clavicle, eight-eighteenths for injury of left shoulder, four-eighteenths for scars over right shoulder and chest, two-eighteenths for injury of back, and seven-eighteenths for disease of heart. The claim was then referred to the medical referee for his opinion upon the medical questions involved, and that officer, having carefully reviewed and given due consideration to all the evidence on file in the claim, replied, in an opinion of December 27, 1887, as follows:

This pensioner has sustained several severe injuries about shoulders; whether they *were received at* the same time as the fracture of the clavicle, I know not. It is cer*tain, however, that* they are not pathological results of fracture of clavicle.

The claim was rejected April 24, 1888, upon the ground that claimant had received from discharge, and was then in receipt of, the full amount of pension allowed by law for all disability shown to have existed from the pensionable cause—fracture of the left clavicle; and the other alleged disabilities were not accepted as pathological results of the pensionable cause. At the same time the alleged injuries of left shoulder, arm, rib, and chest were rejected on the ground of the insufficiency of the evidence to prove the incurrence of said injuries in the service and line of duty, and the former rejection of the other alleged disabilities was adhered to.

From said action of rejection, claimant appealed June 18, 1888, contending that the alleged injuries of left shoulder and left arm, for which a rerating was claimed, were shown by the evidence to have been incurred at the same time and place as the fracture of left clavicle, for which he is pensioned, that the total disability is a pathological result, and that he is entitled to the rerating and increase claimed.

OPINION.

The claim of appellant for a rerating is based upon injuries to left shoulder and arm, which, he alleges, were incurred at the same time and place, and by the same cause, as the disability for which he is pensioned. He also renews an old claim for increase, based upon a number of other disabilities which he alleges he incurred in the service.

The question as to whether the alleged disabilities of appellant could be accepted as results of the injury for which he is now pensioned was submitted to the medical referee, and by him decided in the negative, as shown by his opinion set forth in the foregoing statement of facts; and, in accordance with the general rule of the Department in questions of like character, that opinion will be held as conclusive on the point.

The claim of the appellant to pension upon the basis of the alleged injuries, as independent disabilities, has frequently been passed upon by the Department, upon appeal from repeated rejections of said claim by your Bureau, and it has been decided adversely to the appellant by three successive Secretaries of the Interior.

It does not appear that, since the last departmental decision upon this claim, any new or material evidence has been submitted upon this point which tends, in any manner, to change or to affect its status or to present it in any different light from that in which it was formerly considered; and the Department therefore declines to further consider or to discuss the subject, it being clearly within the rule of *res adjudicata* as held in the cases of Tyner, Noah N., 1 Pension Decisions, p. 21; Hoyt, Birney, *id.*, p. 70; Jones, Roland M., *id.*, p. 162; Gordon, Morgan, *id.*, p. 188; Swartz, 2 Pension Decisions, p. 3; Mullin, Chambers C., *id.*, p. 18; Colnor, Edward, *id.*, p. 21.

For the above reasons your action rejecting this claim, upon the grounds stated in your report herein, is affirmed.

DISHONORABLE DISCHARGE.

FREDERICKA, WIDOW OF HENRY WOERHEIDE.

The soldier, the late husband of claimant, having been dishonorably discharged from the service, the widow occupies no better position and can have no better right to pension than the soldier, who, if he had presented a claim for pension in his life-time, would have been debarred by the evidence proving the aforesaid "dishonorable discharge." (Kaufman, Daniel B., 1 Pension Decisions, p. 383).

Assistant Secretary Hawkins to the Commissioner of Pensions, July 19, 1888.

SIR: Herewith are returned the papers which accompanied your report of July 7, 1888, upon the appeal of Fredericka Woerheide, widow of Henry Woerheide, deceased, late corporal, Company D, Fifth Missouri Cavalry, from your action rejecting her claim for pension.

Soldier enlisted September 4, 1861, and was mustered out of the service, "by reason of mutinous conduct," July 8, 1862.

It is shown by a transcript of the record in the office of the health department of the city of Saint Louis, Mo., that the soldier died at Saint Louis, Mo., December 4, 1871, of cirrhosis hepatis, and without having applied for a pension.

The claimant filed her declaration for pension, as the widow of soldier, November 13, 1884, alleging that the soldier, while in the line of duty at or near Wellsville, Mo., about March 1, 1862, contracted cirrhosis hepatis, resulting in dropsy and its effects, from which he died December 4, 1871.

The records of the War Department show that the soldier was enrolled a corporal of Capt. John C. Wenkle's (Cavalry) Company M, attached to the Fifth Regiment United States Reserve Corps of Missouri, September 4, 1861, to serve during the war, and is reported on rolls of company (now Captain Wenkle's Company D, First Battalion Cavalry United States Reserve Corps) for September and October, 1862, "present" (rolls from October 31, 1861, to June 30, 1862, not on file). Roll for July and August, 1862 (now Company H, Fifth Missouri Cavalry), reports him "absent in arrest at Fort Wyman since July 9, 1862." No regimental returns for November, 1861, or for February, 1862, on file. Returns for December, 1861, and January, March, April, May, and June, 1862, do not report him absent. The muster-out roll of the company, dated at Benton Barracks, Mo., September 25, 1862, reports him a private, with remark, "Mutinied, Rolla, July 8; absent in arrest; not mustered out, by order of General Schofield." He is also reported "mustered out, July 8, 1862, by reason of mutinous conduct and disaffection of the majority of the members of this company." In a subsequent report, dated July 5, 1887, the Adjutant-General states that the company to which the soldier belonged was "ordered and mustered out" September 20, 1862, by reason of the mutinous conduct and disaffection of a majority of its members, and called attention to Special *Field Orders*, No. 1, Headquarters District of Missouri, of that date,

and further reported that, in accordance with said order, soldier was mustered out July 8, 1862. The order referred to is as follows:

[Special Field Order, No. 1.—Extract.]

HEADQUARTERS DISTRICT OF MISSOURI,
Rolla, September 20, 1862.

(1) Companies H, I, and K, Fifth Missouri Volunteer Cavalry, and Company G, Fourth Missouri Volunteer Cavalry, so-called Reserve Corps, now at Rolla, will turn over their armies and other public property to the quartermaster at Rolla, and will move by rail to Saint Louis.

(2) The companies above named will be mustered out of service by Lieutenant Price, Thirteenth Infantry, U. S. Army, as soon as practicable. Those members of these companies who are now in arrest for mutiny will be mustered out as mutineers. Those who are undergoing sentence of general court-martial or awaiting sentence will be excepted from the muster out of service.

By order of Brigadier-General Schofield.

CHAS. S. SHELDON,
Assistant Adjutant-General.

The records furnish no evidence of the alleged disease nor of treatment therefor, nor for any other disease or disability incurred by soldier during his term of service, nor further evidence bearing on the case.

There is no medical evidence on file, of the existence of the alleged disease while in service or at discharge, nor of treatment therefor, prior to November, 1871.

The widow's claim was rejected, August 27, 1887, upon the ground that the soldier was dishonorably discharged from the service by reason of mutinous conduct, as shown by the records of the War Department.

From said action of rejection, claimant appealed June 25, 1888, contending, in substance, that the soldier's death resulted from disease contracted in the service and line of duty, and, since death resulted from disease so contracted, the character of his discharge can not, under the act of July 14, 1862, defeat her right to pension.

Claimant further contends that the soldier at all times performed his duties as a soldier; that he understood them, and that his conduct was without intention to disobey the rules as he understood them; and any disobedience is readily traced to the indefinite terms of enlistment.

OPINION.

There appears to be some confusion in the statements contained in the official record of the soldier's service in the Army, but it is very apparent therefrom, and from the other evidence on file in the case, that the soldier joined with other members of his company and battalion in a mutiny and refused to obey the commands of his superior officers, for which conduct he, with the others, was placed in arrest about July 8, 1862, and, without a formal trial, dishonorably discharged from the service about September 26, 1862, to date from the time of the mutiny, July 8, 1862.

In the case of Kaufman, Daniel B. (1 Pension Decisions, p. 383), it was decided by the Department that "a dishonorable discharge is a bar to pension." It is evident that the rule laid down in the decision above referred to would have been applicable and a complete bar to any claim made by the soldier for a pension for any disability incurred by him in the service from which he was so discharged, and the appellant, as his widow, occupies in this respect no better position, and can have no bet. ter right or title to pension than the soldier if he had presented a claim for pension in his life-time, and therefore the record of "dishonorable discharge" would be fatal to her claim.

It further appears in this claim that there is an absence of any record or medical evidence showing the existence of the alleged disease in the service, or at discharge, and no evidence of treatment therefor prior to the year 1871; and, in accordance with the decision of the Department in the case of McIntyre, Andrew J. (1 Pension Decisions, p. 20), and Fallada, Franz (*Id.*, p. 273), holding that "lay testimony, when unsupported by the record or by direct medical evidence, and which is dated years after claimant's discharge, can not be accepted as proof of incurrence of the alleged disability in the service," it is evident that the appellant has failed to connect by satisfactory testimony the alleged disease of the soldier with his army service.

For the above reasons your action, rejecting this claim upon the grounds stated in your report herein, is affirmed.

LAY TESTIMONY—READJUDICATION.

JAMES SCANLIN.

1. Claimant seeking restoration of pension, the Department holds that lay testimony, dated years after discharge from the service, and unsupported by record or direct medical evidence showing the existence of the alleged disability—there being no hospital record—can not be accepted as proof of incurrence of said disability in the line of duty.
2. Cases long since adjudicated by previous administrations will not be reconsidered upon the mere allegation that proper weight was not given to the testimony in the original adjudication of the same.

Assistant Secretary Hawkins to the Commissioner of Pensions, July 31, 1888.

I have considered the appeal of James Scanlin, late private Second Battery Vermont Volunteers (Certificate No. 118685), from your office decision of July 23, 1885, rejecting his application for restoration to the pension rolls.

Claimant appealed from the action of your predecessor in dropping him from the rolls, November 21, 1884. You reopened his case and *placed it in the* hands of the special examiners' division. The case was *thereupon, May* 19, 1885, investigated by a special examiner, and volu-

minous testimony taken upon the subject of prior soundness. Upon considering the testimony, you adhered to your former decision, and transmitted the papers to this Department, July 24, 1888.

The questions involved are in relation to "incurrence" and "prior soundness."

Soldier enlisted August 30, 1864, for one year, and was mustered out with his battery July 31, 1865. He filed his original application for pension July 18, 1870, alleging injury to right shoulder and hip by being thrown from a caisson while moving at double-quick on review July 4, 1865, at Fort Hudson, Louisiana. He further alleges that, while in the service, he contracted fever and ague, or what is called dumb ague; also, injury to his left foot, by splitting the joint of his great toe while cutting wood—from all of which disabilities he alleged that he was suffering at the date of making application.

Upon said application he was granted pension March 19, 1872, at $8 per month from August 1, 1865, date of his discharge, for disability from pensionable causes.

Upon the report, made to your Bureau by Special Agent F. A. Wardell, that he was in receipt of information which tended to show that appellant was receiving a pension for disabilities that existed prior to enlistment, payment of his pension was suspended July 28, 1879, and a special investigation in his case ordered. Pending this investigation, and prior to his being dropped from the rolls, claimant filed his application for restoration, which being denied, he appealed from your office decision to the Department, November 12, 1884.

November 28, 1879, claimant was dropped from the rolls by order of the Secretary of the Interior, for the reason that the testimony obtained from the special investigation showed that the disability for which pension was claimed was not due to his military service.

Pending the appeal, your office re-opened the case and placed it in the hands of the special examiners' division, with a view to determine the merits of the claim in accordance with the present practice of your office.

The testimony taken at the special investigation last ordered is very full and voluminous. Claimant has also filed a large number of affidavits in his case from neighbors and friends who have known him for many years, who testified that claimant was sound and free from any disability at the date he entered the service. Others testify that he was lame from rheumatism and from injuries received by being thrown from a load of lumber, which, with other disabilities, existed at the date of his enlistment.

In your letter of transmittal, July 24, 1888, to the Department you say:

> After exhausting all accessible sources of evidence, the case was carefully reviewed and the former action adhered to on the ground that the evidence showed that appellant *had one or more attacks* of inflammatory rheumatism, which, for the time at

least, seriously disabled him in his feet, legs, hip, and shoulder; that at some time prior to enlistment he was kicked and seriously injured by a horse; that on another occasion he was thrown from a load of lumber by a runaway team and seriously injured in his leg, side, and shoulder; that subsequent to his discharge from the service he cut one of his great toes; that at and for some time subsequent to his discharge his physical condition was not different from what it was prior to enlistment, and because the evidence furnished by appellant and obtained upon special examination, when considered in connection with appellant's record and history, was not deemed sufficient to connect the disability shown on medical examination with his military service.

While the case is not free from doubt, yet I am inclined to the opinion that your decision should be affirmed and the former adjudication of this case sustained. While the evidence does show that claimant was thrown from a caisson while in the service and in line of duty, substantially as alleged, yet there is an entire absence of proof of medical treatment therefor while in the service, and his own testimony does not show that he was disabled by reason of said accident to such an extent as to render him unfit for duty, or to entitle him to admission to hospital.

In a supplemental affidavit, executed by claimant August 13, 1879, he states, in substance, that in 1853 he had an attack of rheumatism, the result of exposure while riding in a rain-storm. This rheumatism caused violent and severe pains in all parts of his body; thinks it must have been inflammatory rheumatism; thinks this disabled him at that time thirty days, more or less. In 1857, while driving a load of lumber down hill, the horse ran away and he was thrown upon the ground against a bank, striking on his left side and bruising it; and he was kept in the house three or four days as a result of this injury. About a year previous to the date last aforesaid he was kicked in the chest by a colt, which rendered him "lame and uncomfortable, so he did not work for four or five days." He alleges that the foregoing is a true statement of all the injuries, illness, and medical treatment he can remember to have had in his life up to the time of his enlistment, 1864.

In his affidavit, executed before the special examiner, June 4, 1879, claimant repeats in substance the foregoing and adds another disability, viz:

Left foot was cut after his discharge, while making a road; the joint of affiant's great toe was prominent and that was cut off.

In reference to his alleged cut while in the service, he testified:

Affiant's left foot was cut in the service; affiant was cutting wood, and the cut was across the foot near the instep; did not cut deep; does not disable affiant now. * * * Don't know how it came that the cut that affiant got after discharge was put into his application for pension. Affiant won't say whether he did or did not tell Hawkins (his attorney) that he got this cut in the service.

This case comes within the rule of the Department which holds that lay testimony, when unsupported by record or by direct medical evidence, and which is dated years after claimant's discharge, there being *no hospital record* of the disability in the service, can not be accepted as

proof of incurrence of the alleged disability in the service. (See the case of Arad T. Brown, 2 Pension Decisions, p. 88.)

The Department also holds that cases long since adjudicated by previous administrations will not be reconsidered upon the mere allegation that proper weight was not given to the testimony in the original adjudication. (See the case of Chambers C. Mullin, 2 Pension Decisions, p. 18, cited and affirmed in the case of Isaac Sell, July 26, 1888, 2 Pension Decisions.)

Your decision is affirmed. The papers in the case accompanying your letter of transmittal of July 24, 1888, are herewith returned.

VETERAN FURLOUGH—SECTION 4700.

LAWRENCE H. ROUSSEAU.

The language of section 4700, Revised Statutes United States, viz, "with the organization to which they belong," relating to soldiers upon veteran furlough, should be held to mean such soldiers while with their commands when leaving for or returning from veteran furlough, and not when separated and absent at their homes. This construction is based upon the nature of said furlough, upon the peculiar regulations governing it, and upon the evident intent of Congress.

Assistant Secretary Hawkins to the Commissioner of Pensions, June 29, 1888.

I have carefully considered the motion for reconsideration of Departmental decision of January 13, 1888, in the original invalid pension claim, No. 354736, of Lawrence H. Rousseau, late lieutenant-colonel, Twelfth Kentucky Volunteers, upon appeal to this Department, filed by said claimant June 26, 1888.

The principal question raised by the claimant in said motion for reconsideration is as to the correctness of the construction given in said Departmental decision to section 4700, Revised Statutes, relating to the status of claimants for pension who had incurred their disabilities whilst upon veteran furlough. The language of the section is as follows:

Officers absent on sick leave and enlisited men absent on sick furlough, or on veteran furlough with the organization to which they belong, shall be regarded in the administration of the pension laws in the same manner as if they were in the field or hospital.

Your action rejecting the claim was affirmed by the Department in said decision, upon the ground that the claimant had incurred his disability while upon veteran furlough but not at the time with his organization and consequently was not in line of duty. It is contended by the claimant that this construction of the language of the statute is erroneous and that the words "with the organization to which they belong" *should be construed* to mean when they had been furloughed

with said organization, and not that they should be with the organization, as such.

The argument made by the claimant to sustain this view is lengthy and able, but the Department can not, in view of the long line of decisions upon this subject, and the regulations of the service governing and providing for veteran furloughs, accept it as correct.

The regulations of the United States Army, in force at the time when claimant was placed upon veteran furlough, provide with great particularity how such furloughs should be granted.

The organization re-enlisting was granted a veteran furlough as an organization, and, after having turned in their arms and accouterments to the proper officers, were required to proceed, as an organization, and under the command of their officers, to a designated point centrally located in the district of country in which the organization had been recruited and contiguous to the homes of the men. They were then, and at such place, disbanded and scattered to their homes with orders to rendezvous at said point upon a certain date, when they were again organized as a command and returned to the field in the same manner.

It has beeen uniformly held by the Department, under successive administrations, that the language of said section, relating to soldiers upon veteran furlough, "with the organization to which they belong," should be held to mean such soldiers while with their commands when leaving for or returning from veteran furlough, and not when separated and absent at their homes.

This construction was based upon the nature of said furlough and the peculiar regulations governing it as above set forth, as well as upon the evident intent of Congress in enacting said law; and the Department is of the opinion that it is the proper and correct rule to be adopted in such cases. It was held April 15, 1876, in the case of Rutroff, Elizabeth (No. 203420), by Gorham, Secretary, that "a soldier on veteran furlough is not considered in line of duty unless he was with his organization;" and, again, on June 6, 1879, in the case of Maynor, Washington (No. 209954), by Schurz, Secretary, it was held that, "where soldier re enlisted and was granted a furlough with the other members of the company, and, while on said furlough, is captured, and, in escaping from imprisonment, incurred disability, the case was not within the provisions of section 4700, Revised Statutes, not being on furlough with the organization to which he belonged." (See Digest of 1885, page 275.)

With regard to the second point made in said motion for reconsideration, as to whether the claimant was guilty of negligence in employing a student of medicine to peform the operation of vaccination upon him, the Department does not consider it to be a material point, in view of its decision as to the former and the vital question in claimant's case. *It may be said,* however, that the views expressed in said decision with *regard to this point* were based upon the facts as disclosed by the evi*dence then on file* and submitted to the Department for its considera-

tion, and, upon a review of said evidence, the Department is of the opinion that the conclusions then arrived at were, upon the basis of said evidence, correct; but, as has been intimated, this not being the decisive fact adverse to appellant's claim, it would be useless to re-open said claim and disturb the former decision for the purpose of permitting the claimant to file additional evidence upon this point tending to show that he was not guilty of negligence.

For the above reasons the Department is of the opinion that said motion for reconsideration should not be allowed, and it is therefore overruled.

DEATH-CAUSES—IMMEDIATE AND REMOTE.

SARAH A., MOTHER OF JOHN G. STACK.

1. The claimant being a dependent mother, it is held that "the death of her son must have been the natural, direct, or proximate result of his disease contracted in the service." In law the immediate, and not the remote, cause of any event is regarded.
2. The ruling in the case of Alice E. Travers (Vol. 1, Pension Decisions, p. 110) reaffirmed, viz, that "where the death of the soldier, upon whose account the pension is claimed, was caused by an over-dose of a narcotic, or other poison, which had been prescribed originally by a physician to alleviate pain, caused by either disease contracted or wound received in the United States service, or taken upon the soldier's own responsibility through mistake and with no suicidal intent, such death-cause can not be accepted as a competent basis for claim."

Assistant Secretary Hawkins to the Commissioner of Pensions, July 23, 1888.

I have considered the appeal of Sarah A. Stack, mother of John G. Stack, deceased, late private, Company D, Ninth Maryland Volunteers (claim No. 286460), from your office decision of May 11, 1887, rejecting her claim as dependent mother, on the ground that "the soldier's death was in no way chargeable to his army service."

Soldier enlisted July 6, 1863, was discharged March 20, 1864, and died December 22, 1868, without having made application for pension.

Claimant filed her application for dependent mother's pension, September 30, 1881, alleging that, while a prisoner of war confined at Belle Island, the soldier contracted diarrhea, which became chronic and ultimately caused his death upon the date aforesaid.

The record of the Adjutant-General's Office shows soldier enrolled July 6, 1863, at Baltimore, for six months. He is reported on roll, dated August 31, 1863, present; subsequent rolls to December 31, 1863, absent; taken prisoner at Charleston, October 18, 1863. M. O. roll, dated February 23, 1864, reports him the same. Prisoner of war records show him captured at Charlestown, October 18, 1863, and confined at Belle Island, Va.; enrolled at City Point, Va., March 7, 1864; admitted to hospital, Div. No. 2, Annapolis, Md., March 9, 1864; cause *not stated; reported at* Camp Parole, Md., April 7, 1864; sent to place

of enrollment April 8, 1864. No other evidence of disability appears on said record.

Company and regimental records not on file.

Mustered out at Baltimore, Md., April 9, 1864, to date, March 20, 1864.

The company returns and books of organization, including the regimental hospital reports, are not on file.

The records of the Surgeon-General's Office show that claimant entered division No. 2, general hospital (Saint John's College), Annapolis, Md., March 9, 1864, with debility, and returned to duty April 7, 1888.

It is admitted by your office, and the record justifies the finding as a fact, that claimant contracted chronic diarrhea while in the service and line of duty, and that the same continued until the day of his death. The evidence taken at the coroner's inquest affords the only testimony as to death cause.

Eliza De Bone, with whom claimant was boarding at the time of his death, testified December 23, 1868, that—

On Monday morning he (claimant) worked until noon, when he came home complaining of dysentery. He has not worked since, but has been home complaining of the dysentery, though he has been out since, even as late as yesterday afternoon. He took castor-oil and laudanum at first, saying it was what his mother gave him at home. After drinking beef tea yesterday, he said if he was asleep not to awaken him; that if he had sleep, it would be better than eating. About 8 p. m., my domestic went to her room and then heard deceased making an unusual noise, and called my attention to it. I listened and supposed he was only snoring. About ten minutes later, I sent a boy up to him with some beef tea. He tried to awaken deceased, but could not; he reported this and a man went up. He said deceased must be dying. I sent for a doctor, who came and prescribed an emetic, but vomiting was not induced, and, at half past 9 o'clock last evening, he died. I had no idea of his taking anything, nor did I hear him threaten to commit suicide. He has no friends in this city—only arrived here from Philadelphia on Saturday, and said his friends resided in Baltimore.

Dr. John Beach testified that he had made a post-mortem examination of the body of the deceased, and found the odor of opium in his stomach, and, not finding any other lesion, and finding a two-ounce bottle labeled "laudanum," the same being empty, together with the history of the case, he was of the opinion that death resulted by coma, consequent upon poison of opium. The verdict rendered by the coroner's jury was that soldier came to his death "by an overdose of laudanum, taken, as we think, to relieve him of a bowel complaint, on the 22d day of December, 1868."

The only question involved is, did soldier die by reason of his disability (chronic diarrhea), which, it is admitted, was contracted in the service?

The rule governing cases of this nature was announced by the Department in the case of Alice E. Travers (1 Pension Decisions, p. 110), and the distinction made between cases where suicide was committed *by the soldier* when laboring under a suicidal mania or aberration of

mind, caused by wounds or disease contracted in the service and in line of duty (see case of Mary Bunker, 1 Pension Decisions, p. 108), and cases where the suicide or death was caused by the soldier carelessly, or by mistake, taking an overdose of a narcotic or poison. In the first case, the death is held to be the proximate result of his wound or disability which produced the insanity, while, in the second class of cases, the cause of death was the result of carelessness or mistake, and therefore the remote result. It is a well-established maxim that "in law the immediate and not the remote cause of any event is regarded."

To entitle claimant to pension, the death of her son must have been the natural, direct, or proximate result of his disease contracted in the service. If any other cause than his disease, or its legitimate consequences, intervenes, then, the cause of death becomes too remote, and, therefore, claimant would not be entitled to pension.

In this case the evidence does not show that the soldier's death was either the natural, the direct, or the proximate result of diarrhea, but it does tend to show that laudanum, administered in excess, was the direct and prominent cause of death. Whether administered by mistake, negligently, or with suicidal intent, in this case, as presented, is immaterial.

Your decision is affirmed, and the papers in the case accompanying your letter of transmittal of July 17, 1888, are herewith returned.

SERVICE PENSION, WAR OF 1812.

EZRA D. HETFIELD.

Inasmuch as the statute which confers service pensions upon veterans of the war of 1812 expressly requires proof of service of at least *fourteen days'* duration, it must be definitely shown by claimants under said statute not only that they rendered service in said war, but that their service embraced not less than fourteen successive days. Failure to establish by competent evidence the requisite length of service is held to be fatal to a claimant's title.

Assistant Secretary Hawkins to the Commissioner of Pensions, August 1, 1888.

Herewith are returned the papers which accompanied your report of July 18, 1888, upon the appeal of Ezra D. Hetfield, late private, Capt. John Wade's company, New Jersey Militia, from your action rejecting his claim for service pension as a survivor of the war of 1812.

Claimant filed his declaration for pension June 2, 1880, alleging therein, as the basis of his claim, that he is the identical Ezra D. Hetfield who served under the name of Jonathan Hetfield as a private in a company commanded by Capt. John Wade, in the regiment commanded by Col. John Dodd, in the war of 1812; that he volunteered *as a substitute in the* place of Jonathan Hetfield, who was drafted

about the 3d day of September, 1814, for the term of three months, and continued in service for the term of four weeks, and was honorably discharged October 1, 1814.

The records of the office of the Third Auditor of the Treasury Department of the United States show that the name of Ezra D. Hetfield is not borne on the rolls of Capt. John Wade's company of New Jersey Militia. The rolls of Capt. John Wade's company show that Jonathan Hetfield served from September 1 to October 1, 1814, as a private, and was paid for one month $8, and signed receipt-roll; remark: "Promoted October 1, 1814." He served as a corporal from October 1 to December 6, 1814, and was paid $21.93 for two months and six days, and signed the receipt-roll.

The claim was rejected April 20, 1885, upon the ground that the public records show that the service was rendered by Jonathan Hetfield, and that a bounty-land warrant was issued to him for said service.

Subsequently claimant filed some additional testimony, with a view to showing that the service was actually rendered by him for and under the name of Jonathan Hetfield. After having duly considered all of said testimony, the rejection of the claim was adhered to by you, for the reason that it was not deemed sufficient to overcome the record or to prove that claimant actually rendered service as alleged.

From said action of rejection claimant appealed July 2, 1888, contending that the evidence on file is sufficient to clearly establish that he actually rendered service in place of and in the name of his brother, Jonathan Hetfield, as alleged, and was entitled to pension therefor as claimed.

OPINION.

The appellant claims a pension for service in the war of 1812, which, he alleges, he rendered as a member of Capt. John Wade's company, of Colonel Dodd's regiment of New Jersey Militia, from about the 1st of September to the 1st of October, 1814, when he was honorably discharged.

The records of the Treasury Department, Third Auditor's Office, show that he was not borne upon the rolls of said organization, but that one Jonathan Hetfield was; and that said Jonathan rendered, was paid for, and signed the receipt-roll for, the identical service alleged by the appellant to have been performed by himself, and also two months' service in addition as a non-commissioned officer, and was discharged about the 1st of December, 1814, upon the expiration of his term of service. The appellant endeavors to explain this discrepancy between his allegations and said record in the following manner:

He states in his affidavits on file that the above record is upon its face correct, but that the Jonathan Hetfield mentioned therein was an elder brother of appellant, who was drafted in September, 1814, to serve *in the Army* for a term of three months; that said Jonathan being a

married man, and he a young, single man, he volunteered to go in the former's place, substituted himself for his brother, entered the Army, was enrolled, and performed the service described in said record under the name of his brother; that the person described in said record as Jonathan Hetfield was, in fact, this appellant, Ezra D. Hetfield, and that, being the person who actually performed the service, he is entitled to receive the pension provided therefor.

These statements of appellant are, more or less, corroborated by the affidavits of a sister and two brothers, all persons of very advanced age, who testify generally that the appellant did enter and serve in the Army during the war of 1812, in place of his said elder brother, Jonathan; but they are unable to give the particulars or the length of time of said service.

There is no question that domestic arrangements between brothers, such as alleged in this instance, not unfrequently occurred during the war of 1812, as well as during other wars in which this country has been engaged; and, were this claim to be decided upon the testimony above indicated, the Department would be greatly inclined to give the appellant the benefit of the doubt naturally created thereby, and direct an allowance of his claim. There are certain matters, however, that appear of record, which strongly militate against the validity of appellant's claim, and which render such a conclusion impracticable. In the first place, a scrutiny of the signatures of Jonathan Hetfield upon the "receipt-roll" of Capt. John Wade's company, made October 1 and December 6, 1814, respectively, shows incontestably that they were made by the same person; and a comparison of said signatures with that of appellant, made in 1852, and subsequently, discloses such a radical difference in handwriting as to render it almost equally as certain that they were not made by him. Again, the appellant applied for a bounty-land warrant for said alleged services in 1852, and again in 1855; but his claims were rejected. In the application made in 1852, he states under oath that he went into the Army as a substitute in place of his brother Jonathan, served for a short time, was taken sick, returned home, and then Jonathan went into the Army and served out the remainder of his term himself; and this statement is corroborated by the affidavit of one John Rogers, who swears he was a comrade in the same company and service.

In the application filed in 1885, appellant states that Jonathan Hetfield was drafted and served a short time and came home sick, and then he (appellant) volunteered to go in his stead, and serve out the remainder of the term in place of and under the name of Jonathan. This latter statement is corroborated by the affidavit of the widow of Jonathan Hetfield filed in her application for bounty-land on account of the service of her husband in said war—also made in 1855, and thereupon a bounty-land warrant was issued to her.

These different statements are so conflicting and contradictory, and, when taken in connection with the record, are so confusing, that, while they render it probable that the appellant did perform some service in said war as a substitute for or in place of his brother Jonathan, as alleged, the mind is left completely in the dark as to the duration of said service.

In order to entitle the appellant to pension for service in said war it must be satisfactorily shown not only that he rendered service, but that he served for at least fourteen days, as indicated above; and the appellant having failed to satisfactorily establish the length of his service your action rejecting his claim is affirmed.

SECONDARY DEATH CAUSE.

ELIZA, WIDOW OF WILLIAM FAIRFIELD.

The Department adheres to and re-affirms the rule laid down in the case of Mensing, Henry (vol. 1, Pension Decisions, p. 336), wherein it was *held*, that, "to establish secondary or contributory cause of disability or of death, the claimant, before becoming entitled to pension therefor, must prove that the accident resulting in said disability or death was directly caused by the previously incurred pensionable disability, and was not the result of any negligence, carelessness, or risk on part of the soldier, or of a neglect of that due care and caution which ordinary prudence would dictate should be exercised by one in either a diseased or a crippled condition."

Assistant Secretary Hawkins to the Commissioner of Pensions, July 30, 1888.

I have carefully considered the motion for a reconsideration of departmental decision of June 28, 1888, affirming, on appeal, your action rejecting the claim No. 270443, of Eliza Fairfield, widow of William Fairfield, deceased, late private Company D, Third Massachusetts Heavy Artillery, filed by said claimant July 19, 1888.

The principal ground urged by the claimant in said motion to show why a reconsideration of said decision should be had appears to be that the testimony obtained upon the special examination of her claim was not from competent and unprejudiced witnesses, that said examination was not conducted in a fair and impartial manner, and that the statements of the special examiner in relation thereto were untrue.

Nothing appears in the papers nor in the character of the depositions obtained upon said special examination to corroborate or give color to the allegations of claimant; but, be that as it may, it is evident upon a review of said decision that the truth or the falsity of the statements made by the special examiner, or the character of said examination, can have no bearing upon the reconsideration of said decision, since the grounds upon which it was rendered are not thereby *affected.*

It is admitted, and shown by the evidence, irrespective of that obtained upon said special examination, that the immediate cause of the soldier's death was an injury occasioned by an accidental fall occurring many years after his discharge from the service. It is the theory of the claimant that said accident was occasioned by the rheumatic affection, of army origin, with which he was afflicted and for which he was pensioned at the time. There is not one word of evidence on file to show that said pensioned disability was the sole cause of the accident producing the soldier's death, nor to determine to what extent, if any, it may have contributed thereto. The claim rests upon mere supposition and conjecture. The soldier was crippled by rheumatism, for which he was in receipt of a pension. He fell down some steps and sustained injuries, causing his death. Therefore, as is contended by claimant, his death was necessarily due to the disability incurred in his army service. The Department has uniformly refused to permit the grant of pension in any such case, holding that the cause of death was too remote from the military service.

The rule to be followed in claims of this character was distinctly enunciated by the Department in the analogous case of Mensing, Henry (1 Pension Decisions, p. 336), in which it was held—

To establish secondary or contributory cause of disability, or of death, the claimant, before becoming entitled to pension therefor, must prove that the accident resulting in said disability or death was directly caused by the previously incurred pensionable disability, and was not the result of any negligence, carelessness, or risk on the part of the soldier, or of a neglect of that due care and caution which ordinary prudence would dictate should be excercised by one in a diseased or a crippled condition.

The proof furnished by claimant wholly fails to meet the requirements of the above-cited rule, and it rests upon her to establish her claim by satisfactory and competent evidence before she can become entitled to pension.

The above was the ground upon which said decision rests, and after a careful review of the claim the Department can see no good reason to modify or alter its views as therein expressed.

Said decision will therefore be adhered to, and said motion is overruled.

MARRIAGE—LEX LOCI.

FANNY, ALLEGED WIDOW OF FRANK H. CURTIS (COLORED).

1. In determining the validity of a marriage the Department recalls section 2 of the act approved August 7, 1882, amending section 4702 of the Revised Statutes, which provides that "marriages, except as are mentioned in section 4705 of the Revised Statutes, shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of marriage, or at the time the right to pension accrued."

2. It is a settled ruling of the courts, both State and Federal, that a "marriage, valid at common law, is valid, notwithstanding the statutes of the State where it is contracted prescribe directions respecting its formation and solemnization, unless they contain express words of nullity."

Assistant Secretary Hawkins to the Commissioner of Pensions, July 11, 1888.

I have carefully considered the motion for reconsideration of Departmental decision of October 3, 1887, upon the appeal of Fanny Curtis, alleged widow of Frank H. Curtis, deceased, late private Company C, Fifth Massachusetts Cavalry Volunteers (colored), from the action of your Bureau rejecting her claim for accrued pension, filed by claimant with this Department November 7, 1887 (1 Pension Decisions, page 324).

In the opinion of the Department rendered upon said appeal, affirming your action of rejection, the questions arising in the claim were fully discussed, and the statutory provisions controlling the status of the alleged widow of the deceased soldier construed. To the construction there given said statute, the claimant excepts, contending that error was committed by the Department.

For the purpose of a clearer understanding of the exact questions involved, it may be well to briefly recapitulate the principal facts in the case. The deceased soldier was a pensioner at the time of his death, which occurred May 23, 1885. The claimant seeks to obtain the accrued pension due him at the time of his death, alleging that, on November 1, 1884, she and the deceased associated themselves together and lived together as man and wife from said date until his death, and that they regarded and treated each other in all respects as husband and wife, being so recognized and regarded by their neighbors and friends, although it is admitted that they were not joined in matrimony by any ceremony deemed by them obligatory or recognized by law; and she claims to be entitled to said accrued pension as the widow of said deceased soldier, by virtue of the provisions of section 4705 of the Revised Statutes. Said section is as follows:

SEC. 4705. The widows of colored and Indian soldiers and sailors who have died, or shall hereafter die, by reason of wounds or injuries received, or casualty received, or disease contracted, in the military or naval service of the United States, and in the line of duty, shall be entitled to receive the pension provided by law without other evidence of marriage than satisfactory proof that the parties were joined in marriage by some ceremony deemed by them obligatory, or habitually recognized each other as man and wife, and were so recognized by their neighbors, and lived together as such up to the date of enlistment, when such soldier or sailor died in the service, or, if otherwise, to *date of death;* and the children born of any marriage so proved shall be deemed and held to be lawful children of such soldier or sailor; but this section shall not be applicable to any claims on account of persons who enlist after the third day of March, one thousand eight hundred and seventy-three.

As is fully set forth in the aforementioned Departmental opinion in *this claim, this section* is founded upon previous legislation upon the

same subject, commencing with the act of Congress approved July 4, 1864, and is substantially the same as section 11 of the act approved March 3, 1873.

While the Department is disposed to adhere to its construction of said section as set forth in said opinion, so far as relates to the class of persons to whom it applies, and holds that such a married relation as is therein contemplated must have been formed while the status of the parties remained in the anomalous condition growing out of their previous condition of slavery, etc., and further holds that said section could not have been intended to apply to them after they had been, by the amendments to the Constitution, invested with all the rights and privileges of citizens of the United States, yet, it recognizes the fact that it would be entirely within the power of such persons to contract a valid and legal marriage in accordance with the law of the place where said parties resided at any time after enlistment, which would, upon due proof of the same, entitle the widow of the soldier to pension.

Section 2 of the act approved August 7, 1882, amending section 4702 of the Revised Statutes provides—

> That marriages, except as are mentioned in section 4705 of the Revised Statutes shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of marriage, or at the time when the right to pension accrued, etc. * * *

It appears to be the settled ruling of the courts, both of the United States and most of the States, that "a marriage valid at common law is valid, notwithstanding the statutes of the State where it is contracted prescribe directions respecting its formation and solemnization, unless they contain express words of nullity." (See Meister *vs.* Moore, 96 U. S., 76; Maryland *vs.* Baldwin, 112 U. S., 490.)

The Department is of the opinion that there is sufficient evidence of cohabitation, recognition, and reputation on file in this claim to establish a valid marriage at common law between these parties; and, as the laws regulating marriage in the District of Columbia, where they resided at the time, contain no provision expressly prohibiting or declaring such marriages invalid, it follows, under the rule laid down by the Supreme Court of the United States, above quoted, that the relation thus formed between said parties must be considered as a valid marriage in accordance with the laws of the place where contracted, that the claimant must be recognized as the lawful widow of the soldier, and entitled to the accrued pension claimed.

For the above reasons the Department concludes that the decision hereinbefore referred to, affirming the action of your bureau rejecting the claim of said Fanny Curtis for accrued pension, was error, and the same is hereby reconsidered, overruled, and for naught held, and your said action rejecting said claim is reversed, and you are hereby directed to adjudicate *said claim in* accordance with the views herein expressed.

ATTORNEYS' FEE—INCREASED DISABILITY.

MILO B. STEVENS & CO. (ATTORNEYS).

Inasmuch as the second proviso of section 4780 of the Revised Statutes, as amended by the act of July 4, 1884, directs that "no greater fee than $10 shall be demanded, received, or allowed in any claim for increase of pension on account of increase of the same disability" for which the pension was originally granted, the Commissioner of Pensions is precluded from allowing to attorneys a fee in excess of $10 in the case under consideration, even though claimant had entered into a contract for the payment of $25.

Assistant Secretary Hawkins to the Commissioner of Pensions, August 3, 1888.

Herewith are returned the papers which accompanied your report of the 28th of June, 1888, upon the appeal of Milo B. Stevens & Co., from the action of your office refusing to allow a fee of more than $10 upon the re-issue dated September 23, 1887, of certificate No. 73332, in favor of Theophilus Sweet, who was a private in Company A of the One hundred and twelfth Regiment of New York Volunteers.

The said Theophilus Sweet is pensioned on account of disability from shell wound of the head. On the 12th of June, 1882, he filed an application for increase of pension on account of the gunshot wound of head and paralysis of the right arm. Milo B. Stevens & Co. were attorneys in the case. On the 1st of May, 1885, they filed a contract, in which applicant agreed to allow them a fee of $25 upon the granting of the additional pension.

Upon the allowance of the increase of pension by certificate dated September 23, 1887, a fee of $10 was paid to Messrs. Stevens & Co.

From the action of your office refusing to recognize the contract the appeal is taken.

The appellants hold that the contract for a fee in the case should be recognized for two reasons:

(1) That it was a claim for increase of pension on account of a new disability;

(2) That it was a case in which difficulty and trouble were encountered in its prosecution.

This is not a claim for pension on account of a new disability. No new cause of disability was established in the claim to which the appeal relates. The evidence shows that all the disability under which the pensioner labors results from the shell wound of head, the origin of which was established in the original claim. The second proviso of section 4786 of the Revised Statutes, as amended by the act of July 4, 1884, directs that no greater fee than $10 shall be demanded, received, nor allowed in any claim for increase of pension on account of increase of disability for which the pension was originally allowed. That proviso expressly precludes the Commissioner of Pensions from allowing a fee in excess of $10 in the class of cases to which the one under consideration belongs.

The action of your office to which the appeal relates is approved.

ATTORNEYS' FEE NEGLECT TO PROSECUTE.

MILO B. STEVENS & CO. (ATTORNEYS).

1. The failure of attorneys to file any paper in a claim or to perform any service for more than two years is sufficient evidence of neglect to bring them within the provisions of Rule No. 16, regulating practice before the Bureau of Pensions, and, in the absence of any sufficient cause shown therefor, is conclusive evidence of abandonment, and authorizes the Commissioner of Pensions to recognize another attorney.
2. Mere private records, kept in attorneys' office, are not to be received as proof of due diligence. Such diligence must be shown by the state of the record in the claim.

Assistant Secretary Hawkins to the Commissioner of Pensions, July 30, 1888.

Herewith are returned the papers which accompanied your report of July 20, 1888, upon the appeal of Milo B. Stevens & Co., attorneys, of Detroit, Mich., from the action of your office in refusing to recognize them as attorneys in the pending claim for increase of pension of Almond B. Gage, late a private, Company F, First Michigan Cavalry, certificate No. 83,043.

The soldier was originally pensioned, June 19, 1869, at the rate of $5.33⅓ per month, for gunshot wound of right hip and left thigh. The rate of pension was subsequently increased, January 25, 1882, to $12 per month.

On June 21, 1883, the appellants filed a declaration as attorneys for pensioner, alleging increase of the disability on account of which pension had been allowed, and varicocele of left testicle as a new disability. This claim was rejected December 18, 1883.

On July 15, 1885, the appellants filed fee agreements, but, so far as is shown by the record, took no further action in the prosecution of the claim.

On August 2, 1887, a duplicate declaration was filed by P. J. Lockwood, of Washington, D. C., who was recognized as attorney of claimant by your office, and who prosecuted the claim.

From your action recognizing P. J. Lockwood as attorney in the claim, and refusing to recognize the appellants, the appeal was taken June 25, 1888, contending:

(1) That the attorneyship in a rejected case should be governed by the same rules as obtained in cases not rejected.

(2) That, in cases where contracts are filed for fees, the attorneyship should be determined by reference to the terms of the contract, and not by any arbitrary rule of the office.

(3) In thus determining the propriety or the impropriety of allowing the attorney of record to be superseded, both parties should be heard.

Your action was taken upon the ground that the neglect of the appellants to *prosecute the claim* from July 15, 1885, to August 2, 1887—a

period of more than two years—is, in default of cause shown therefor, conclusive evidence of abandonment of the claim by them, and that your action in thereafter, recognizing Mr. Lockwood as attorney in the claim, was proper.

It appears to the Department that the failure of the appellants to perform any service or to file any paper in the claim for more than two years, so far as is shown by the papers on file in the record, is sufficient evidence of neglect to prosecute to clearly bring them within the provisions of Rule No. 16, regulating practice before your Bureau; and, in the absence of any sufficient cause shown therefor, became conclusive evidence of abandonment of the claim, and unquestionably authorized you to recognize another attorney.

The contention of the appellants that their private records, kept in their office, are to be received as evidence of due diligence is not tenable, and could not have been seriously urged by them. Diligence must be shown by the state of the record in the claim, and the failure of appellants to file any paper or to call up the claim, or to take any other step therein for the time indicated, will be taken as conclusive evidence of neglect on their part, unless excused by a sufficient reason.

The remaining points urged by the appellants are not relevant to and have no bearing upon the question presented in this appeal. They relate merely to the views of appellants as to the policy and justice of the practice before your Bureau in the prosecution of pension claims, and to the rules prescribed for the regulation of the same. These questions the Department declines to discuss here, merely remarking that the rule of which complaint is made has the force and effect of law; and, as the conduct of appellants has unquestionably brought them within its operation, its enforcement in this instance was undoubtedly proper.

Your action herein is accordingly affirmed.

ATTORNEYS' FEE—INCREASE OF PENSION.

MILO B. STEVENS & CO., ATTORNEYS.

Where an attorney claims a fee for alleged services in the procurement of an increase of pension, but it appears that said increase was the result of the mere operation of a law of Congress, the claim should be denied, the payment of a fee in such cases being unlawful under the provision of the act of July 4, 1884, which says that "no fee shall be demanded, received, or allowed in any claim for arrears of pension, or arrears of increase of pension allowed by any act of Congress passed subsequent to the date of the allowance of the original claim in which such arrears of pension or of increase of pension may be allowed."

Assistant Secretary Hawkins to the Commissioner of Pensions, June 30, 1888.

Herewith are returned the papers which accompanied your report of *May 23, 1888,* upon the appeal of Milo B. Stevens & Co. from the ac-

tion of your office in refusing to allow them a fee in the increase claim of Rhodes J. Colvin, late private, Third New York Independent Battery, certificate No. 40179.

Pension was originally granted this soldier March 29, 1865, from February 20, 1865, at the rate of $8 per month, for disability resulting from amputation of right forearm and gunshot wound of left hand; increased to $15 from June 6, 1866, and to $18 from June 4, 1872.

On December 8, 1881, the appellants, in behalf of claimant, filed a declaration for increase, alleging, in addition to the disability caused by loss of little finger, loss of use of middle finger and stiffness of left hand. Upon this declaration the claimant was examined by a board of surgeons at Providence, R. I., February 22, 1882, and in their report the board found a disability entitling the soldier to third-grade rating, caused by loss of right forearm, and disability entitling him to three-eighths rating caused by injury to left hand. The appellants filed no evidence afterwards in behalf of the claimant.

On June 28, 1883, in pursuance of the provisions of the act of March 3, 1883, the soldier's pension was increased by your office to $24 per month from the date of the act for loss of right hand. No fee was certified to any attorney. On September 15, 1886, the soldier's pension was increased to $30 per month, under the act of August 4, 1886, which pension he is now receiving.

From the action of your office in refusing to certify a fee in the increase claim as above, Milo B. Stevens & Co. appealed May 2, 1888, setting up that "the application for increase filed by them, together with the oath of indemnity, was made the vehicle whereby the increase allowed under the act of March 3, 1883, was conveyed to the soldier. * * * That the question is as to the propriety of making use of an attorney's work for the benefit of the claimant, whereby the claimant is much benefited, the attorney being denied the fee upon the ground that no attorneys are recognized in this class of cases."

The case now comes before the Department upon this appeal.

It is held in your report of May 23, 1888, as follows, that—

As the degree of disability for which pensioner received a higher rating under the act of March 3, 1883, was established prior to filing the declaration for increase by the appellants, December 8, 1881, and as the said increase was based upon said act, and was not due to any services performed by them (the appellants), the action of this Bureau in refusing to allow them a fee on the issue in question is not error.

These views are in accord with those of the Department expressed in the decision of June 28, 1888, in the case of the appeal of Milo B. Stevens & Co. in the matter of the increase claim of Franklin S. Moncrief, late private, D Company, Tenth New Jersey Volunteers, certificate No. 28732. The cases are practically identical, and hence it seems unnecessary to repeat here the principle therein laid down. The pensioner takes increase by mere operation of existing law, and the intervention of an attorney is not only unnecessary, but, it may be added, the pay-

ment of fee in such cases is unlawful under the provisions of the act of July 4, 1884, which recites—

That no fee shall be demanded, received, or allowed in any claim for arrears of pension, or arrears of increase of pension allowed by an act of Congress passed subsequent to the date of the allowance of the original claims in which such arrears of pension, or increase of pension, may be allowed.

The action of your office, which was correct and in accordance with the rulings, is affirmed.

DEPENDENT MOTHER—ADEQUATE SUPPORT.

SARAH, MOTHER OF JAMES E. CUSHMAN (DECEASED).

Where the evidence shows that, at the date of deceased soldier's enlistment, at the time of his death and subsequently, the mother was provided with an adequate support, first by her husband's estate and then by reason of a life-time contract for maintenance by her surviving son or sons as a condition in the purchase of the aforesaid estate, it is held that the mother is not dependent in the sense that would entitle her to a dependent mother's pension under the law.

Assistant Secretary Hawkins to the Commissioner of Pensions, July 9, 1888.

Herewith are returned the papers which accompanied your report of June 23, 1888, upon the appeal of Sarah Cushman, mother of James E. Cushman, deceased, late private, Company F, Ninth Maine Volunteers, from your action rejecting her claim for pension.

Soldier enlisted September 22, 1861, and died July 20, 1863, at Hilton Head, S. C., in hospital, of gunshot wounds received in action.

The claimant filed her application as dependent mother April 17, 1873, based upon the service and death of the soldier, alleging that she was in part, at least, dependent upon him for her support at the time of his death.

The claim was rejected April 23, 1877, after a special investigation, on the ground that claimant's husband was able to and did support his family during the year 1863 and before and after that time, without the aid or contribution of other parties.

Subsequent to said action of rejection appellant filed some additional testimony, which was duly considered and found insufficient to warrant a different action upon her claim, and the former rejection was adhered to.

From said action of rejection, claimant appealed July 8, 1886, contending that said rejection was contrary to the law and evidence in the case, and that she was justly entitled to the pension claimed.

Pending the consideration of said appeal the claim was re-opened and subjected to an exhaustive special investigation in the field under the present system. Upon the return of the testimony thus obtained, and after due consideration of the same in connection with the evidence formerly filed, the former action of rejection was adhered to, upon the ground that claimant was not dependent upon her said son, whether *in whole or in part*, at the time of either his enlistment or his death.

OPINION.

It appears from the testimony on file in this case that the soldier at the time of his death was about nineteen years of age, that, prior to his enlistment, he had lived and worked at home, and that during that time his earnings went toward the support of his father's family, of which he was a member.

It further appears that, at the time of or shortly after his enlistment, some assignment or allotment of his pay was made in such manner that the sum of $10 per month was paid through the State officers to his parents during the term of his service. The evidence also shows that appellant and her husband had a large family of small children dependent upon them for support, and the appellant claims that her husband, at the time the soldier enlisted and at his death, was, on account of disease and physical disabilities, incapable of furnishing a suitable support for herself and family. The evidence shows, however, that, prior to soldier's enlistment, appellant's husband (soldier's father) owned an improved farm of 160 acres of fairly productive land, with the usual improvements and necessary stock, teams, and farm machinery to carry it on, and, while he was somewhat in debt for the farm, his credit was good, and he appeared to be as prosperous as his neighbors at that time and for several years thereafter, he having furnished his family with an adequate support.

It further appears that about 1872 appellant's husband sold the farm to their son, William W. Cushman, who at that time paid off the outstanding debt thereon and turned the farm over to another son, Jonathan Cushman, who undertook to pay off the debt and support appellant and her husband during their natural lives, in consideration of having the title to the farm conveyed to him at their death; and that since that time appellant and her husband have continued to reside upon the farm and have received an adequate support therefrom under said contract.

The Department is clearly of the opinion, from the above state of facts, that the dependence of appellant upon the soldier, as alleged, has not been shown to exist, either at the time of his enlistment and death or subsequently, so as to entitle her to pension under the law as a dependent mother. Consequently, your action of rejection of this claim is affirmed.

PRESUMPTIVE EVIDENCE—PATHOLOGICAL SEQUENCE.

DANIEL M. REDDING.

1. The evidence showing that prior to and at the date of enlistment claimant was free from the alleged disability, but that at the date of discharge and subsequently the disability existed in a pensionable degree and so continued to the time of filing declaration for pension, the presumption, that the alleged disability originated *in and was due to* the service, becomes conclusive.

2. Disease of eyes being ascribed, as a result, to small-pox incurred in the service and treated in hospital as shown by record, it is *held* that, "it being shown that claimant's eyes were good prior to the attack of small-pox, but that subsequently his sight began to fail, and continuance being shown, the disease of eyes can be accepted" as a probable pathological result of the small-pox of record, and pension therefor allowed.

Assistant Secretary Hawkins to the Commissioner of Pensions, June 30, 1888.

Herewith are returned the papers which accompanied your report of June 23, 1888, upon the appeal of Daniel M. Redding, private, Company K, One hundred and seventy-sixth Ohio Volunteers, from your action rejecting his claim for pension.

Soldier enlisted July 30, 1864, was mustered into the service September 2, 1864, and was discharged the 22d of June, 1865. He filed a declaration for pension December 1, 1876, alleging as the basis of his claim that, in May, 1865, at Nashville, Tenn., he contracted small-pox, which resulted in disease of eyes.

In support of his claim for pension, claimant submitted the affidavits of Dr. D. E. McMillin, Samuel M. Alkire, Isaac Smith, and Benjamin Lingo.

Dr. McMillin, in his affidavit of June 14, 1881, testified that he knew claimant well and that he was sound at and prior to enlistment; that, in June, 1865, on his return from the service and as he was recovering from an attack of small-pox, he was attacked with typho-malarial fever, during which he noticed his eyes being badly affected with conjuntivitis, caused, he thought, by small-pox.

Samuel M. Alkire, a second lieutenant of same company, testified to his intimate acquaintance with soldier and to his soundness at and prior to enlistment. He states, also, that soldier contracted small-pox at Nashville, Tenn., in May, 1865, was taken to the hospital, and, after his discharge, was badly pock-marked, and has complained of his eyes ever since.

Isaac Smith and Benjamin Lingo, neighbors of soldier, testified to prior soundness and disease of eyes at and since discharge.

The claim was rejected on the 25th of November, 1881, on the ground that the alleged disease of eyes was not a result of small-pox, nor otherwise shown by the record to have been chargeable to claimant's military service.

On hearing of this rejection claimant prepared to submit additional evidence in support of his claim. The testimony subsequently filed is principally of a medical character and tends to show the existence of disease of eyes after discharge, and that the disability was the result of small-pox contracted in the service.

Dr. McMillin, in his affidavit of the 20th of December, 1884, and the 22d of July, 1886, reiterates the testimony he had already given, and *states more fully* the facts and circumstances upon which he based his

conclusion that soldier's disease of eyes was due to small-pox contracted in the service.

Dr. R. H. Tipton, who was acquainted with soldier for years prior to 1862, testifies as to his soundness during that period, his treatment of claimant for disease of eyes in 1868, and for years after, and to soldier's claiming at that time that his disability was due to small-pox contracted in the service.

Dr. C. W. Mackey certifies that he examined soldier on the 23d of December, 1886, and found him afflicted with amblyopia and blepharospasm, and that in his opinion he was about one-half incapacitated for manual labor. He also states that soldier had small-pox, as indicated by the results, and in all probability disease of eyes resulted therefrom.

Dr. J. G. Sims certifies that he examined soldier on the 14th of July, 1885, and found his vision materially below normal. He states also that, after a thorough examination, he is led to the conclusion that the loss of vision is the result of confluent small-pox, contracted in the spring of 1865.

Dr. David S. Kinsey certifies that he examined claimant on the 24th of December, 1886, as to the condition of his eyes, and fully corroborates the testimony of Dr. Mackey. He states, also, that in his opinion soldier's condition is the sequelæ of small-pox. He noticed his eyes were sore when he first saw him after discharge.

To this must be added the testimony of David Davis, first lieutenant of the same company, who taught claimant for a time, and who was most intimately acquainted with him, not only during his term of service, but also previous to his enlistment. Mr. Davis testifies to soldier's prior soundness, to his enlisting him into his company and regiment, and to his being with him all the time until he was taken with the small-pox. This affiant further states that after soldier came home he went to see him, and for the first time found him suffering with disease of eyes.

On the 8th of October, 1887, the evidence in the case was submitted to the medical referee for his opinion as to whether—

(1) Appellant has suffered any pensionable degree of disability from the alleged cause, disease of eyes?

(2) If he has been disabled by disease of eyes, can such disease in this case be accepted as the probable result of small-pox, which he is shown to have contracted in the service?

(3) Should the rejection in this case be adhered to on medical grounds?

To these inquiries the medical referee, on the 4th of January, 1888, very properly replied as follows:

If it is shown to the satisfaction of the legal division that this claimant's eyes were good prior to the attack of small-pox, and that subsequently thereto his sight began to fail, and continuance is proven, the disease of eyes shown being a probable result of small-pox, can be accepted as having been caused by the small-pox of record.

The question of pathological sequence is therefore eliminated from the consideration of the appeal, and the issue is limited to a careful and impartial review of the facts suggested in the foregoing opinion.

In order to determine the justice of appellant's claim, it will be well to consider the condition of soldier's eyes at and prior to his enlistment, at the time he contracted the small-pox, at the date of his discharge, and his disability, if any, from that time to the present.

Your office seems to admit that soldier was sound as to his eyes at the time of his enlistment. This fact is satisfactorily proven by the testimony of Doctors McMillin and Tipton, and of neighbors Smith and Lingo. Moreover, the soldier is entitled to the presumption that he was sound at the time of his enlistment. There can, therefore, be no doubt that he was free from said disease of eyes when he joined the service.

From the fact that his name appeared on the muster-rolls of his company to the 5th of February, 1865, when he was admitted to the general hospital at Nashville, Tenn., it may also be fairly presumed that he did not suffer from any disease of eyes up to that date. This theory is confirmed by the testimony of Lieutenants Davis and Alkire of the same company and regiment.

The records of the Surgeon-General's Office show that claimant was admitted to No. 8 general hospital at Nashville, Tenn., on the 5th of February, 1865, with remittent fever, and that he was treated in that hospital for gonorrhœa from the 7th of that month until the 19th day of May following, when he was admitted to the Cumberland general hospital, also at Nashville, Tenn., and from there, after two days, was transferred to No. 11 (pest) general hospital, same place, suffering from small-pox. These records also show that he remained in this hospital until he was discharged from the service on the 24th of June, 1865.

The question now arises as to whether soldier suffered from disease of eyes prior to being afflicted with small-pox.

It is clear that he was free from this disability at his enlistment and prior to his entry into the hospital at Nashville, Tenn., on the 5th of February, 1865. That he continued in this condition until his transfer to No. 11 (pest) general hospital, suffering from small pox is testified to by Lieut. David Davis, as already shown. Moreover, the hospital records, prior to his incurring small-pox, make no mention of soldier suffering from disease of eyes, or of his having received any treatment for this disability. It mentions remittent fever, gonorrhœa, and variola, but does not make any allusion to disease of eyes. Itis, therefore, fair to presume that he did not suffer from this disability before he contracted small-pox, and that he received no treatment for disease of eyes during the fifteen weeks previously spent in hospital.

The value and effect of hospital records have been repeatedly passed upon by the Department. As a contemporaneous statement of the facts to which it relates, it is entitled to and should receive the highest *credit. When* claimant has a hospital record in the service, the pre-

sumption is that said record embraced all the treatment which claimant received and all the disabilities for which he was treated in said hospital, and this presumption will obtain until the contrary is clearly and satisfactorily shown by competent evidence (see case of Gottlieb Unger, 1 Pension Decisions, page 425). Besides, the record of hospital treatment is presumptively correct, covering all the disabilities for which soldier was treated (see case of Thomas J. Irwin, vol. 1, Pension Decisions, page 425). Furthermore, a hospital record showing treatment for certain disabilities in the service furnishes the legal presumption that said record embraced all the disabilities that claimant had contracted at the time it was made. (See case of John W. Dalton, vol. 1, Pension Decisions, page 450)

It would seem, therefore, to be satisfactorily established that claimant's eyes were sound prior to his being afflicted with small-pox, and before his entry into the hospital where he was treated for this disease.

The records of the Surgeon-General's Office show that the soldier was discharge from the service at the hospital at which he had just received treatment for small-pox, and that he did not afterwards return to active military duty. The hospital record does not state that soldier suffered from disease of eyes during the time he was treated for small-pox. The evidence, therefore, of disease of eyes being the pathological sequence of the small-pox is necessarily found outside this record. Had claimant remained in the service for a reasonable time after his discharge from the small-pox hospital, and had he shown no symptoms of disease of eyes during that time, it would be fair and reasonable to conclude that the disability of eyes was not due to the service. This, however, not being so, the appearance of the disease immediately after discharge is a material element in tracing its cause and origin.

The medical and lay testimony already cited shows that soldier was afflicted with disease of eyes at the time of his discharge, that it has continued ever since, and was, in the opinion of the witnesses, due to small-pox contracted in the service.

The certificates of examining surgeons also show the existence and continuance of this disability.

Examining-Surgeon Jones, on the 26th of August, 1878, found soldier permanently disabled from disease of eyes, which disqualifies him from business one-fourth total. On the 19th of September, 1881, he rated him one-half total from same cause.

Examining-Surgeon C. F. Clark, on the 18th of October, 1886, attributes soldier's weakness of eyes as probably due to old age.

Dr. Howard Jones, an examining surgeon, on the 19th of October, 1887, states that, "if applicant can be believed, his disability is directly due to small-pox, and I am of the opinion that he is honest in his statement."

From a full and impartial consideration of the evidence in the case, it appears satisfactorily that claimant's eyes were sound at and prior

to enlistment, also at the time he contracted small-pox, and that the disease of eyes which existed at his discharge has continued since, it being the result of small-pox contracted in the service.

Your action, therefore, rejecting appellant's claim is reversed, and you will please place the name of Daniel N. Redding on the pension roll in accordance with the law and with the rules and regulations of your office.

INCURRENCE-RERATING.

ISAAC SELL.

1. Lay testimony, when unsupported by record, or by direct medical evidence, and when dated years after claimant's discharge, there being no hospital record of the disability in the service, can not be accepted as proof of incurrence of the alleged disability in the service.
2. Where there is a hospital record contemporaneous with the alleged injury, such record raises the presumption that it contains a record of all the disabilities for which soldier was treated, and such presumption can be overcome only by clear and convincing evidence.
3. Where a case was long since adjudicated and by a previous administration, the same will not be reconsidered nor re-adjudicated upon the mere allegation that proper weight was not given to the testimony in the original adjudication.

Assistant Secretary Hawkins to the Commissioner of Pensions, July 26, 1888.

I have considered the appeal of Isaac Sell, late of Company H, Seventeenth Pennsylvania Cavalry (Certificate No. 249,168), from your office decision of August 31, 1883, granting him a pension at $4 per month, as result of rheumatism, chronic diarrhea and resulting piles, and also from your office decision of June 14, 1884, restoring him to the rolls at $2 for piles, the result of diarrhea.

On May 21, 1888, claimant appeals for the reason that you rejected his claim for loss of hearing, and that his rating of June 14, 1884, was not warranted by the testimony.

Soldier enlisted October 12, 1862; was discharged May 6, 1865; filed his declaration for invalid pension November 7, 1866, alleging chronic diarrhea and piles contracted in the service and in line of duty about the 30th of April, 1863.

The records of the Adjutant-General's office show claimant "present March and April, 1863; absent, teamster in the First Division since April 6, 1863. From May, 1863, to April 30, 1864, present; May and June, 1864, to October 31, 1864, absent, sick, sent to Washington May 3, 1864; November and December, 1864, transferred to First Battalion, Invalid Corps, District of Columbia. The records of this office furnish no evidence of injury as claimed. Muster-roll 239, Company, First Battalion, Invalid Corps, to which transferred April 20, 1864, at Camp Stoneman, *District of* Columbia, by reason of old age and debility, for September *and October, 1864*, report him absent, sick in hospital, Giesboro', District

of Columbia; November and December, 1864, present for duty; same to April 30, 1865; May and June, 1865, report him discharged on surgeon's certificate of disability."

The records of the Surgeon-General's office show "Isaac Sell, private, Company H, was admitted to Findlay General Hospital, Washington, D. C., April 30, 1864; that he was admitted to Mower General Hospital, Chestnut Hill, Philadelphia, Pa., May 6, 1864, with chronic rheumatism, and transferred May 13, 1864; that he was admitted to general hospital, Chester, Pa., May 14, 1864, convalescent, and deserted May 30, 1864; and was admitted to post hospital, Giesboro', District of Columbia, September 24, 1864, with debility, and returned to duty, Volunteer Rifle Corps, October 16, 1864. Cause of transfer to Volunteer Rifle Corps not stated. No further record of the soldier's treatment found. There is no record of the regiment on file."

Claimant's discharge certificate shows that "said private, Isaac Sell, was thrown from an ammunition wagon at or near Hope Landing, Virginia, April, 1863, and was injured in the right shoulder and also in the spine. This man requests his discharge." Description of disability attached thereto certifies "Injury to the right shoulder and also to the spine, received at Hope Landing, Virginia, April, 1863; also senile disability, being over fifty-three years of age. Disability one-half."

In declaration filed February 25, 1880, claimant alleges that, on or about April 30, 1863, he "had contracted, from injuries received, from exposure and cold, and from chronic diarrhea, chronic rheumatism, and then met with an accident while driving an ambulance wagon; was thrown from the wagon and injured in the head to that extent that he lost the hearing of the left ear," and claimed pension for the "loss of hearing of left ear and for loss of physicial health."

Claimant was medically examined October, 1866, which examination revealed the fact that claimant was suffering from diarrhea and piles, for which he was rated total. He was again examined at Pottsville, Pa., by a single surgeon, who certified that there was no physical evidence that chronic diarrhea ever existed; that there was no disability from rheumatism; that appellant complains of loss of eye-sight, but it is senility; that his ear-drum is not ruptured.

He was again examined by a board of surgeons March 2, 1881, who report "appellant alleges no disability from diarrhea. We discover no physical signs of rheumatism; we find entire loss of hearing of left ear. Rate one-fourth."

Claimant's case was examined by special examiner, May 30, 1883, who reported:

> Claimant is a very well-preserved old man; his father and mother lived to be upwards of ninety years of age. Hence his condition of preservation is accounted for. I have no doubt the old gentleman is somewhat disabled by diseases he contracted in the Army, but the disability is very slight, and his rating should be low. I would most respectfully recommend the admission of the claim.

Thereupon your office issued a certificate for pension to claimant at $4 per month, for chronic diarrhea and resulting piles, from date of discharge to September 13, 1880, when it was alleged disability ceased.

Claimant made application for restoration, and was examined before the Harrisburg board January 16, 1884, which reported—

Applicant complains of tenderness on pressure on right shoulder and right side, but we can discover no structural changes, no thickening of the joints, nor muscular atrophy. Heart size and sounds normal. No rating. Chronic diarrhea; the mucous membrane of tongue and fauces is normal. Appellant complains of no indigestion; there is no tenderness on pressure over abdomen, no tympanites; can discover no evidence of present diarrhea; liver and spleen normal. No rating. Piles: after severe bearing-down efforts, four small hemorrhoidal tumors appear at anal margin; size from small hazel-nut to large pea. Disability one-eighth.

Claimant was again examined before single surgeon at Lebanon, Pa., April 5, 1884, who reported:

Mere senility; alleges he is suffering from consumption, piles, disease of heart, and rheumatism, disease of spine, deaf in left ear, not able to hear but little with the right ear. I have had a long conversation in a very low tone, and find he hears quite as well as I do, or any man of his age. After a careful examination I find no piles, the sphincter muscle is somewhat relaxed. I find no disease in any of the other organs more than we could expect in a man of his age. His heart and lungs are normal. No signs of rheumatism, and his head appears clear. He walks erect and very smart for an old man. No rating.

On June 14, 1884, your office granted a restoration certificate on the opinion of the medical referee, for piles, the result of diarrhea, at $2 per month, commencing the day after he was dropped, and decided that no pensionable disability was shown to exist from rheumatism since date of dropping.

Claimant was again examined August 26, 1885, by a board at Harrisburg, Pa., which reported:

We can discover no objective symptons of diarrhea at present. There is no tympanites, and no tenderness on pressure over abdomen, liver and spleen normal, tongue not cracked, the external sphincter ani is relaxed, and on straining applicant is able to exude four small piles. Disability one-fourth. Deafness: There is perforation of left memb. tymp. in lower segment, membrane thickened, H. D. nil, right memb. tymp. normal. There is total loss of hearing in left ear. Rheumatism: Heart sounds normal, no structural change in muscles, tendons, or joints. Rate one-fourth for piles, and one-half total for that caused by loss of hearing in left ear, nil for rheumatism; total three-fourths.

Claimant having filed his appeal, alleging error in your decision in the matter of rating, also in ignoring his injury resulting in deafness, your office, July 13, 1888, referred the medical issue in the case to Dr. Campbell, the medical referee of your office, for his opinion from a medical stand-point as to whether the rate allowed claimant on the date of restoration was correct, and also whether the evidence subsequently filed warrants an increase. On the same date the medical referee reported as follows:

The rate of pension allowed the claimant on restoration was fully commensurate *with his disability.* Not shown to be entitled to increase.

All the medical testimony in the case was before the medical referee f your office at the time he rendered this opinion.

The Department uniformly holds that, where questions of a purely ıedical character are involved, it must be guided by its medical adisers, and the opinion of the medical referee in such cases is generlly held conclusive. (See William H. Garrison, decided by the Deıartment September 10, 1887, 1 Pension Decisions, p. 262; also cases f Joseph F. Ennis, *Ibid.*, p. 127; Lucinda Gaskell, *Ibid.*, 29; Patrick 'reston, *Ibid.*, 41; Joseph F. Faulkner, *Ibid.*, 292; Uriah W. Romine, *bid.*, 299; Henry Mulholland, 2 Pension Decisions, p. 75, and cases here cited).

While it is true that the lay and medical testimony in the case does stablish the fact that claimant was sound and free from deafness at he time he enlisted and that when he left the service he was suffering rom partial deafness in the left ear, yet, the fact that claimant in his riginal application for pension fails to make any claim for pension by eason of deafness, alleging other disabilities instead, together with he testimony of the examining surgeon in the case, raises the presumpion that his disability from loss of hearing at that time, even if inurred in the service and in line of duty, was so slight as not to be leemed worthy of notice by claimant himself.

In the case of Arad P. Brown, decided by the Department April 9, 888 (2 Pension Decisions, p. 88), the Department re-affirmed the rule hat "lay testimony when unsupported by record, or by direct medical vidence, and which is dated years after claimant's discharge (there eing no hospital record of the disability in the service), can not be ccepted as proof of incurrence of the alleged disability in service." t was also held in the same case, that "where there is a hospital ecord cotemporaneous with the alleged injury, such record raises he presumption that it contains a record of all the disabilities for hich soldier was treated, and that such presumption can only be overome by clear and convincing evidence."

This case was long since adjudicated, and by a previous administration, nd such cases are not to be reconsidered, nor re-adjusted upon the mere llegation that proper weight was not given to the testimony and evience in the original adjudication. (See case of Chambers C. Mullin, Pension Decisions, p. 18.)

I find no error in the opinion of the medical referee, and your decision, ased thereon, was therefore authorized and will not be disturbed.

The papers in the case, accompanying your letter of transmittal of uly 21, 1888, are herewith returned.

PENSION FOR INSANITY—DATE OF ALLOWANCE.

ALBAN G. STABLER.

The effect of proviso in section 2, act of March 3, 1879, excepting from the limitations therein cited, with reference to arrears of pension, claims filed by or in behalf of insane persons, is to practically expunge from said act the aforesaid limitations so far as they might otherwise relate to claims based upon insanity alleged to be due to the line of duty in the service. Therefore, by reason of that proviso, the allowance of pension for insanity can not be restricted to the date of filing claim, but must relate back to and begin from the date of soldier's discharge from the service.

Assistant Secretary Hawkins to the Commissioner of Pensions, July 11, 1888.

I have carefully considered the communication dated July 5, 1888, of C. H. Harding, chief of law division of your Bureau, requesting a reconsideration by this Department of its decision of April 24, 1888, reversing your action rejecting the claim of Alban G. Stabler, committee of Henry Mulholland, insane, late private Company A, Seventeenth U. S. Infantry, certificate No. 338937, for a re-issue and arrears of pension.

The Department is of the opinion, after a careful review of said claim and of the decision therein rendered, that the questions raised and the points presented in said communication were sufficiently discussed in the original departmental decision of the claim, and that the correctness of the position taken by the Department has been made sufficiently clear. It may be stated, however, for the purpose of making the matter more clear, if possible, that, in the opinion of the Department, the terms of the proviso contained in section 2 of the act of March 3, 1879, excepting claims by or in behalf of insane persons from the limitation prescribed therein, have the effect of eliminating from said statute said limitation, so far as all such claims are concerned. If this is true, and the present claim were adjudicated under said statute without reference to such limitation, can there be a doubt that the claimant would be entitled to arrears of pension, as contended by him?

The Department can not accept the proposition urged in said communication that, if the claimant was sane at the date of executing his declaration, then, his pension should commence at the date of filing his said claim and he would be excluded from the benefits of the exception contained in said proviso. Such a proposition, if carried to its legitimate and logical conclusion, would result in manifest injustice and absurdity, tending to defeat the very object for which said exception was inserted in the law. For instance, take the case of a soldier who had contracted the disability of insanity in the service and in line of duty, who had been confined continuously in an insane asylum from the date of his discharge to the 1st day of July, 1880, and was upon said *date discharged* from said asylum as cured. If he had immediately *executed and filed* a declaration for pension upon said date, he would not,

according to the position maintained by Mr. Harding, be entitled to arrears of pension for the time that had elapsed from the date of his discharge from the service to the date of filing his declaration, for the reason that he was sane when he executed it; and he certainly could not be pensioned from the date of filing, inasmuch as his disability had ceased; and thus a just claim would be entirely defeated by the application of said proposition.

Upon its former consideration of this claim, the Department did not, nor will it now, enter into the question as to whether or not the facts in the claim as to incurrence in the service and line of duty, etc., have been sufficiently established, for the reason, as stated in said former opinion, that all such matters have been adjudicated and settled by your action granting claimant a pension, and were not presented for determination on said appeal; and the Department can not see that it can better declare its position than by reiterating the statement contained in said opinion, viz, that "by your adjudication of the claim of appellant and the grant of a pension for the disability of insanity from the date of his filing his application, you have necessarily adjudged and determined that his alleged insanity originated during his military service, existed in a pensionable degree at the date of his discharge, and has continued to a more or less extent to the present time," and, further, that he is necessarily included with all other claimants for pension upon the ground of insanity within the exception contained in the proviso aforesaid, and is, therefore, entitled to its benefits.

For the above reasons the Department declines to reconsider its opinion rendered upon the appeal in this claim, and adheres to the same.

INCURRENCE—LAY TESTIMONY.

LEVI REEVES.

Where there is no record nor medical evidence to sustain the claim, showing the incurrence of an alleged disability in the service and in line of duty, and where claimant has delayed more than sixteen years to file declaration for pension, the evidence necessary to justify the Department in reversing the action of the Commissioner of Pensions in rejecting the claim should be both strong and conclusive. The Department re-affirms the rule that "lay testimony when unsupported in a case like this by the record or by medical evidence, and which is dated years after claimant's discharge, can not be accepted as proof of the incurrence of the alleged disability in the service."

Assistant Secretary Hawkins to the Commissioner of Pensions, August 6, 1888.

I have considered the appeal of Levi Reeves, Company H, Twenty-ninth New Jersey Volunteers (claim No. 336839), from your office decision of May 28, 1883, rejecting his claim for invalid pension upon the ground that "there is no record, and claimant is unable to furnish medical evidence of prior soundness."

Claimant appealed from your said decision February 18, 1884, alleging in substance that the testimony in the case did not warrant the decision.

May 21, 1884, your office informed the Department that the action rejecting the claim had been reconsidered and would be placed in the hands of a special examiner to determine the merits of the case and the value of the testimony therein. The case was accordingly examined May 30, 1885, and, upon the final report of the special examiner having the case in charge, and upon the opinion of the medical referee that there was "no ratable disability from this cause (sun-stroke) since date of discharge," your office adhered to the former decision and rejected the claim.

The papers are now transmitted to this Department for consideration on said appeal.

An examination of the records discloses that soldier enlisted August 30, 1862; was discharged June 30, 1863; filed his declaration for invalid pension January 21, 1880, alleging as his disability sun-stroke at Aquia Creek, Va., June 16, 1863, and rheumatism in shoulders and arms, contracted in the winter of 1862–'63.

The records of the Adjutant-General's Office show that claimant is reported: "Present on muster-rolls of company from enrollment to April 10, 1863; March and April, 1863, absent, sick in division hospital. Corporal, mustered out with the company June 10, 1863, at Freehold, N. J., (no remark as to disability). Regimental returns for November, 1862, and January, 1863, do not report him absent. Nature of sickness not stated. The records of this office furnish no evidence of alleged disability, winter of 1862 and 1863."

The records of the Surgeon-General's Office show that "Levi Reeves, corporal, Company H, Twenty-ninth New Jersey, entered regimental hospital, date not stated, with jaundice, and was transferred April 21, 1863. Entered First Division Hospital, 1st A. C., Windmill Point, Va., April 21, 1863; diagnosis and disposition not stated. No further record of soldier's treatment found. Records of the regiment prior to February, 1863, and subsequent to June 10, 1863, are not on file."

Claimant was first examined by a single surgeon July 18, 1881, at Tom's River, N. J., who reports as follows:

In my opinion the said Levi Reeves is one-eighth (or $1 per month) incapacitated for obtaining his subsistence by manual labor from the cause above stated, viz, sun-stroke and rheumatism.

The claimant states he has a headache and a burning sensation around his head most of the time when the sun shines hot, and can't see good when the sun is bright. Not ratable. Claimant also states he has rheumatic or dull, aching pains through his shoulders and in his elbows most of the time, and sometimes has shooting pains at his heart, all of which are worse by spells, and especially severe before storm.

Claimant was next examined by a board of surgeons at Philadelphia, December 13, 1882, who report as follows:

The examination reveals the following facts:
Heart irritable, easily excited, and irregular.

The right elbow is somewhat swollen, and can not be extended to a full right angle on account of contraction of the muscles of arm. This he claims was the result of rheumatism. Rated for the rheumatism one-half degree.

Alleges that he suffers severe neuralgia. If incident to service, rated at one-half degree. This man describes frontal headache rather than the headache that veritable sun-stroke produces. We suspect that he resides in a district not free from malaria, and it may be possible that his condition may be in good degree induced by local causes. The influence of army life must be very potent indeed to have the force ascribed. The man is old and broken down.

The disability as above described entitles him to one-half degree."

Claimant's case was examined May 30, 1885, by a special examiner of your office, whose investigation appears to be thorough and impartial. The testimony taken was voluminous, and, in order that no injustice might be done claimant, he caused him to be again specially examined by the Philadelphia board of surgeons, June 3, 1885, who report as follows:

Applicant is old; senile disabilities have limited his usefulness as a laborer. Has arcus senilis, complains of pains in muscles, especially in adductor longus, and gracilus in both thighs.

The right arm and elbow show but little objective evidences of rheumatism, although the subjective symptoms are very marked. There is a little grating in the shoulders on extreme elevation of the arm, and tendon of right biceps seems to stand out a little prominent when he moves the fore-arm or arm. Heart irritable, easily excited and thrown into irregular action; a basic bruit is also detected. Alleges frontal headache, but not the typical headache of sun-stroke.

He is, in our opinion, entitled to a one-half rating for the disability caused by rheumatism, one-half for that caused by disease of heart, and nothing for that caused by sun-stroke—the sum of which aggregates total.

Has double inguinal hernia, from relaxation of abdominal walls.

This man has probably never had sun-stroke, but has been exhausted and weak from feeble heart, and this state continues to be the cause of his inability to stand heat.

Hears voice at 12 feet, at ordinary voice; hears watch tick at about 6 inches, in both ears.

He has over the dorsum of either hand an eruption which seems to be eczema palmaris chronica. This eruption is also noticed on feet and back of neck. Hands are toil-hardened; genitals normal; no evidence of syphilis.

The medical referee, with the medical evidence before him, on June 23, 1885, rejected the claim for sun-stroke upon the ground that "no ratable disability is shown since the date of discharge."

An examination of the testimony in the case, including the voluminous testimony taken by the special examiner, fails to establish the fact that claimant received a sun-stroke while in the service; and it also fails to show that claimant contracted rheumatism while in the service.

There is no record nor medical evidence to sustain the claim; and in cases of this nature, where claimants have delayed for over sixteen years to file their application for pension, the evidence to justify the Department in reversing your decisions rejecting their claims should be strong and conclusive. This case comes within the ruling of the Department in the case of Tobias Baney (vol. 1, Pension Decisions, p. 342), wherein the Department said that, "in the absence of any positive or

reliable record, or medical evidence, showing the incurrence of said alleged disability in the service and in line of duty, or its existence and treatment of the same while in the service, or at the time of discharge, the claim should be rejected." (See case of John W. Dodge, *Ibid.*, p. 211.)

Lay testimony, when unsupported in a case like this by the record or by direct medical evidence, and which is dated years after claimant's discharge, can not be accepted as proof of the incurrence of the alleged disability in the service. (Andrew J. McIntyre, vol. 1, Pension Decisions, p. 20; Joseph Hesse, *Ibid.*, p. 255; Arad P. Brown, vol. 2, Pension Decisions, p. 88, and cases there cited.)

The fact that claimant is not rated for any disability as the result of sun-stroke would not entitle him to a pension, even though he had proved incurrence. (See Leonard Nerreter, vol. 1, Pension Decisions, p. 67; Daniel Bower, *Ibid.*, p. 257.)

The testimony in this case is conflicting. Some of the witnesses are rated by the special examiner as unreliable, and, in this respect, the case is similar to that of David Smith, decided by the Department July 23, 1887. (See vol. 1, Pension Decisions, p. 201.)

I am of the opinion, after a careful examination of the testimony in the case, that your rejection of the claim was not error, and your decision is therefore affirmed. The papers accompanying your letter of transmittal of July 30, 1888, are herewith returned.

SERVICE PENSION—WAR WITH MEXICO.

ROBERT W. P. MUSE.

1. The failure or inability of a claimant under the act of January 29, 1887, to show that, being duly enlisted, he "actually served sixty days with the Army or Navy of the United States in Mexico, or on the coast, or frontier thereof, or en route thereto in the war with that nation," is fatal to his claim for service-pension under the aforesaid act.
2. The fact that a claimant received a bounty land grant on account of service in the war with Mexico is *prima facie* evidence of his service and honorable discharge; but the service required under the bounty land law was radically different from that required under the act of January 29, 1887, the former requiring only fourteen days and the latter sixty days; nor were applicants for bounty land required to show that they had served "in Mexico, or on the coast, or frontier thereof, or en route thereto."

Assistant Secretary Hawkins to the Commissioner of Pensions, July 23, 1888.

Herewith are returned the papers which accompanied your report of July 17, 1888, upon the appeal of Robert W. P. Muse, alias William P. Muse, late first sergeant, Capt. John S. Love's company, Third Ohio Volunteers, from your action rejecting his claim for pension.

Claimant filed his declaration for pension March 8, 1888, alleging that *he enlisted at* McConnellsville, Ohio, on or about the 25th day of May,

1846, under the name of William P. Muse, and continued in actual service in the war with Mexico for the term of about four months, and was honorably discharged at McConnellsville, Ohio, on the 25th day of November, 1846; that he is sixty-six years old, and that he received a bounty land-warrant between the years 1851 and 1853 on account of his said service, and claims a pension under the act of January 29, 1887.

The records of the War Department show that claimant was enrolled as first sergeant of Capt. John S. Love's company on the 3d day of June, 1846, in Morgan County, Ohio (term of enlistment is not reported), and was mustered out with the company, which was mustered for discharge October 29, 1846. The records show:

This company never left the State, and was mustered out on account of being in excess of the President's requisition. It is considered as mustered out at McConnellsville, Ohio, to date June 17, 1846, date to which paid on muster out.

The Second Auditor of the Treasury reports that William P. Muse was paid on roll of Capt. John S. Love's company, Ohio volunteers, for fifteen days, from June 3 to June 17, 1846. He was paid $9.92 travel pay, and $8 subsistence, the number of miles to the place of rendezvous being 162, and from place of discharge home the same. The number of days is not stated. Privates were paid $5.28 travel pay for the same distance. His claim was rejected April 10, 1888, upon the ground that he was not in Mexico, nor on the coast or frontier thereof, nor en route thereto during the war with that country.

From said action of rejection claimant appealed April 24, 1888, contending that he "enlisted in said war, as the records show, and that, under his enlistment, he actually traveled over 200 miles from McConnelsville to Cincinnati—just as much and as truly en route to Mexico as if he had been on the march from Monterey to the City of Mexico. The company was organized at McConnellsville, and their services accepted, and when they started to Cincinnati they were just as much en route as if they had gone to the front. Furthermore, his services have been recognized from the fact that, under the act of Congress approved September 28, 1846, Revised Statutes, section 2418, claimant applied for and actually received a land warrant for 160 acres of land about 1852."

OPINION.

The act of Congress of January 29, 1887, under which the claim of appellant for pension is made, does not undertake or propose to provide a pension for every person who was in the military service of the United States during the Mexican war, but limits and expressly designates those to whom a pension can be granted under said act, specifying in express terms the character and kind of service in said war which will entitle to pension.

By the terms of said act the Secretary of the Interior is "authorized and directed to place on the pension-roll the names of the surviving *officers and enlisted men*, including marines, militia, and volunteers of

the military and naval service of the United States, who, being duly enlisted, actually served sixty days with the Army or Navy of the United States in Mexico, or on the coast or frontier thereof, or en route thereto, in the war with that nation."

It is obvious that it would be necessary, in order to obtain a pension under said act, that it should appear, not only that the person seeking its benefits was in the service of the United States at that time, but that he did actually serve for the period of time and rendered the particular service therein designated.

It appears from the official record, and from the evidence in this claim, that appellant, with others, responded to the call of the governor of the State of Ohio, issued in pursuance of the proclamation of the President of the United States for volunteers for service in the war with Mexico, and that, on reaching the designated rendezvous at Camp Washington, near the city of Cincinnati, Ohio, said volunteers were organized into companies and regiments; that more responded than were necessary to complete the quota of the State under the President's proclamation; and that from those assembled the number necessary to fill the quota were selected for service in said war, the remainder, including appellant's company, being sent home without a formal discharge and afterwards mustered out or formally discharged, to date from the time they were sent home, and paid only for the time they were actually with their organizations.

It must be apparent to any unprejudiced mind that the service rendered by appellant, who volunteered and reported at the rendezvous and was rejected or discharged because the State's quota was already filled, can not be accepted as service in the war with Mexico, nor en route thereto, since all the acts shown to have been performed by him in this case were but the preliminaries to the accceptance of him and his organization for that service; and therefore he can not be said to have served sixty days, nor any other number of days, in Mexico, nor on the coast or frontier thereof, nor en route thereto in the war with that nation, as is required by the terms of said act to give title to pension.

But, again, admitting, for the sake of the argument, the contention of appellant that he was en route to Mexico when on his way from McConnellsville, Ohio, to the place of rendezvous near Cincinnati, yet, it is still necessary for him to show that he served for a term of sixty days en route before he would be entitled to pension. Appellant appears to have been with his organization, at the rendezvous, for fifteen days, and, according to the official report, to have traveled 162 miles from his home to that place, and the same distance returning. Allowing him one day for each 20 miles, or fraction thereof, traveled, going and returning (which is the estimate allowed by law in such cases), gives nine days' travel each way, or eighteen days going to and returning from *the rendezvous*. Adding these to the fifteen days, we have his entire *term of service* as thirty-three days. If the appellant's statement of

the distance traveled, as made in his affidavit, dated May 1, 1852, and filed in his claim for a bounty land warrant, is accepted as correct—360 miles each way—and he is allowed the same rate of travel as before, we have eighteen days for travel each way, or thirty-six days going and returning, which, added to the fifteen days' service, gives fifty-one days, the entire limit of service which could be claimed, and a less period of time than that required under the provisions of said act to give him a right to pension, even assuming, what can not be admitted, that the service shown in the case was service en route to the seat of war, or in the war with Mexico.

The appellant and his attorney appear to be under the mistaken impression that, because a bounty land warrant had been issued to him for said service, a prima facie claim for pension under said act is necessarily established.

The proviso to the third section of said act states that "when any person has been granted a land warrant under any act of Congress for and on account of service in said war with Mexico, such grant shall be prima facie evidence of his service and honorable discharge; but such evidence shall not be conclusive, and may be rebutted by evidence that such land warrant was improperly granted."

It is thus seen that the only effect of the grant of such a bounty land warrant to the appellant was that such fact shall be received as "prima facie evidence" of his service, necessary under the law, to entitle him thereto, and his honorable discharge therefrom. The service required under the bounty land law was radically different from that required under this act, the former only requiring fourteen days' service and the latter sixty; nor were the applicants for bounty land required to show that they had served in Mexico, or on the coast or frontier thereof, or en route thereto. It follows, therefore, that the grant of a bounty land warrant to appellant may be accepted in this case as prima facie evidence to the full extent provided for in said act, and still not affect the grounds of rejection hereinbefore set forth, nor be sufficient, of itself, to establish appellant's claim.

For the above reasons the Department is clearly of the opinion that your action rejecting this claim was proper, and it is affirmed.

PENSIONABLE DISABILITY—INCURRENCE.

JOHN BLAIR.

1. The Department reaffirms the ruling in the case of Lemuel R. Scott, that "a disability or injury, to be pensionable, must be of such a character and exist to such a degree that it can be detected by the examining surgeons or board of surgeons of the Pension Office." (Vol. 1, P. D., p. 77).
2. The certificates of examining surgeons cannot be set aside nor controverted by the testimony of either family physicians or neighbors, especially where such certificates *were made by a board of surgeons, based upon a careful examination of the party in interest.* (W. L. D. O'Grady, 1 P. D., p. 222.)

3. It is also held that "where there is no record nor medical evidence of the incurrence of the alleged disease in the service and line of duty, and a pensionable degree of disability is not shown to have existed since filing of claim, the application for pension should be denied." (Vol. 1, P. D., p. 228).

Assistant Secretary Hawkins to the Commissioner of Pensions, August 29, 1888.

I have considered the case of John Blair, private, Company K, One hundredth Pennsylvania Volunteers (claim No. 204605), of July 18, 1888, on appeal from your decision of June 26, 1886, rejecting his claim for invalid pension upon the ground of there being "no record nor other satisfactory proof on file showing that, during his military service, the appellant was disabled as alleged."

The two questions involved are, 1st, incurrence; 2d, the existence of the alleged disabilities in a pensionable degree. The appeal appears to be based upon the alleged error of your office in holding that the evidence failed to prove the disability; and claimant insists that the evidence clearly brings his case within the ruling of the Department in the case of Thomas S. Harkins. (Vol. 1, P. D., p. 459.)

Soldier enlisted September 9, 1862, was discharged May 30, 1865, and filed his declaration for invalid pension May 24, 1875, alleging partial paralysis of lower limbs, June, 1863, incurred while his command was in pursuit of General Morgan. He fixes the time at which the attack first manifested itself, alleges that he was then engaged in cleaning his gun, and that he was treated in field hospital under the surgeon of the regiment. In a subsequent affidavit, filed May 6, 1886, he alleges an injury to the spine, incurred during a night attack upon Fort Steadman in front of Petersburgh, Va., March 25, 1865, by falling down an embankment.

The records of the Adjutant-General's Office show claimant "reported present, and so reported to August 31, 1863; September and October, 1863, absent, sick, at Crab Orchard, Ky., and so reported to December 31, 1863; January, February, March, and April, 1864 (four months' muster), present, and so reported to June 30, 1864; July and August, 1864, absent; return for August, 1864, on extra duty; September and October, 1864, present, and so reported to April 30, 1865. He was mustered out on detachment muster-roll May 30, 1865, at Delaney House, D. C."

The Adjutant-General says: "The records of this office do not furnish any evidence of paralysis as claimed."

The records of the Surgeon-General's office show that "Private John Blair, Company K, One hundredth Pennsylvania, was admitted to Convent Hospital, Camp Nelson, Ky., October 20, 1863, with rheumatism, and returned to duty January 22, 1864. The records of Crab Orchard, Ky., date from August 24, 1863, and furnish no information in the case. No records of the regiment subsequent to February, 1862, on file."

It may be admitted, for the purpose of this case, that claimant con-

tracted disabilities in the service and in the line of duty, as alleged. Notwithstanding this fact, the medical evidence in the case fails to show that claimant was disabled thereby in a pensionable degree. Out of four medical examinations, three rate claimant as not disabled, while the rating of the fourth is based entirely upon claimant's statements.

Soldier was first examined at New Castle, Pa., March 14, 1880, by a single surgeon, who reported as follows:

He claims that he was injured by falling over a bank and striking on his right hip and the lower part of the spinal column. He complains of tenderness on pressure over the lower part of the spine—worse at the extreme point of the coccyx. There is a tumor on the posterior part of the right thigh—the tumor is flattened, 3 or 4 inches in diameter and 1 inch thick. He thinks it was caused by the fall; says his lower extremities are weak and that he is lame from injury of the right hip. The muscles of the leg are in fair condition, and I am unable to discover any positive signs of partial paralysis of the lower extremities.

He was next examined at Butler, Pa., June 3, 1880, by a single surgeon, who reports:

There is no evidence of paralysis, nor, indeed, can I discover any difference physically in the lower extremities comparatively, the right one, of which he complains as being tender, weak, and painful in the groin, disabling him for manual labor. I am unacquainted with him, but he seems to be an honest man. I can not rate a disability from cause alleged in order.

Claimant's third examination was at Mercer, Pa., September 20, 1883, before a board of surgeons, who reported:

This man has no disease of spine. He has a tumor of right leg. (See diagram.) We examined him very carefully and believe he has no disability. His legs are of the same size.

The last examination was before a board of surgeons at Youngstown, Pa., who report:

Examination shows a man of only fair muscular development, and we find that applicant has had a fracture of the sacrum, about three-quarters of an inch above sacro cocygeal articulation, which has united at an obtuse angle so that lower end and cocoyx are curved sharply forward. No difference in muscles of side of body; circumference of right thigh just below gluteal fold 1 inch larger than left; the other measurements the same. He has a fatty tumor about 3x2x1 inches over posterior surface of right thigh, 2 inches below gluteal fold; pattellar tender, reflex or ankle clonus not noticed. No heart disease or evidence of rheumatism. Urine, sp. gr. 1015; reac., neutral; no albumen or sugar, pale amber. Subjectively gives history of numbness in lower extremities, with pain at different times and of varying intensity. We rate on his statement. We find the disability as above described to entitle him to total $8 rating.

June 26, 1886, the acting medical referee rendered the following opinion, based upon the medical evidence in the case:

Claimant does not now have any pensionable disability from injury of spine. It is a question of fact whether the injury of cocoyx, described by last examining board, was caused by fall in service. The injury as described by them might cause numbness of lower extremities; but, aside from statements of claimant himself, there is very little *evidence of actual* disability.

This case comes within the ruling of the Department in the claim of Lemuel R. Scott (1 P. D., p. 77), where the Department held that a "disability from disease or injury to be pensionable must be of such a character and exist to such a degree that it can be detected by the examining surgeons or board of surgeons of the Pension Office."

It is also the well-established rule, applicable to this case, that the certificates of examining surgeons can not be set aside nor controverted by the testimony of either family physicians or neighbors, especially where such certificates were made by a board of surgeons based upon a careful examination of the party in interest. (See the case of William L. D. O'Grady, 1 P. D., p. 222.)

It was held in the case of Henry M. Carothers, that "where there is no record or medical evidence of the incurrence of the alleged diseases in the service and line of duty, and a pensionable degree of disability is not shown to have existed since filing of claim, the application for pension should be denied." (See 1 P. D., p. 228.)

In the case of Daniel Bower, the Department held that the "absence of affirmative evidence establishing the origin of the alleged disability and its continuance since discharge, together with the fact that claimant is not now rated by the examining surgeons, justifies rejection of the claim." (See 1 P. D., p. 257.)

In the case of Ezra Bailey, decided by the Department May 7, 1887, it was held that, "although the disability alleged is shown to have existed in the service, pension must be denied when claimant fails to prove the disability has existed in a pensionable degree since discharge." (1 P. D., p. 130.)

In the case of Austin Brothers, the Department held, "where claimant's right to increase of pension is purely a medical question, it is properly determined by medical examinations, and the reports of such examinations made by boards of examining surgeons can not be overturned by the affidavits of claimant's family physicians." (1 P. D., p. 313. See also case of Joseph L. Tanner, *Ibid.*, 63; Edward M. Crawford, *Ibid.*, 48.) The same principle was involved in the case of Wilson G. Gray (1 *Ibid.*, 120) where the Department held that, "in consideration of appeals for rerating, the Department relies upon the certificates of the examining surgeons relative to the degree of disability from time to time. (See case of John Allee, 1 P. D., 241.)

The Department accepts as conclusive of purely medical questions the opinions of the medical referee in preference to those of family physicians. It was so held in the case of Ziba Yarnell. (2 P. D., p. 25.)

In the case of Edward Posson (2 P. D., p. 36) the Department, after referring to a number of cases in support of the proposition, reiterated the rule that—

> It is the settled practice of the Department to be guided in the determination of questions purely medical by the opinions of its medical advisers, and to accept as *generally conclusive* the opinions of the medical referee when based upon the results *of medical examinations.*

In the case of Leonhart Miller, decided by the Department July 24, 1888, it was held that—

Proof of incurrence of disability in the service and in line of duty is not alone sufficient to entitle claimant to pension, for the alleged disability must have existed in a pensionable degree, and such degree must be established by medical and other competent evidence as existing also since the date of claimant's discharge.

The principles heretofore announced must control in this case. Claimant fails to show the existence of his alleged disabilities in a pensionable degree. The medical examinations appear to have been fair and impartially conducted, and the opinion of the medical referee based thereon justifies your action in rejecting the claim.

Your decision is therefore affirmed, and the papers in the case accompanying your letter of transmittal of August 22, 1888, are herewith returned.

"INVALID" PENSION—"SERVICE" PENSION.

THEODORE T. ECKERSON.

Section 4724 Revised Statutes expressly inhibits a person in the Army, Navy, or Marine Corps from receiving a pension "as an invalid" whilst drawing the pay of his rank or station in the service; but the act of January 29, 1887, provides for the officers and soldiers of the Mexican war a purely *service* pension. Such pension is not given by reason of any "disability" that may have been incurred in the service, nor is it in any sense an invalid pension, such as the aforesaid section inhibits. Therefore, the "surviving officers and soldiers of the Mexican war," whether now in active military service or on the retired list, are entitled to the *service* pension for which the act of January 29, 1887, specifically provides.

Assistant Secretary Hawkins to the Commissioner of Pensions, September 3, 1888.

I have carefully considered the motion for reconsideration of departmental decision of January 21, 1888, affirming, on appeal, your action rejecting survivor's service-pension claim (Mexican war) No. 981, of Theodore J. Eckerson, late private, Third United States Infantry, filed by claimant May 17, 1888.

It appears from an examination of the record that the claimant had fully complied with all the requirements of the act of January 29, 1887, and had fully established his title to the service pension provided by said act, but that his claim was rejected by your Bureau, and said rejection affirmed on appeal by this Department, upon the ground that "the claimant was at the time of the passage of said act and is now a retired officer of the United States Army, and is in receipt of his pay as such, and consequently was debarred from receiving said pension by section 4724, Revised Statutes United States."

A careful review and reconsideration of said decision has led the Department to the conclusion that said decision and your action rejecting said claim upon the ground above stated were erroneous.

Section 4724 Revised Statutes provides as follows:

No person in the Army, Navy, or Marine Corps shall draw both a pension as an *invalid* and the pay of his rank or station in the service, unless the *disability* for which the pension was granted be such as to occasion his employment in a lower grade, or in the civil branch of the service.

It will be observed that said section places an inhibition upon the receipt of pension by those officers, soldiers, and seamen of the Army or of the Navy, or of the Marine Corps, who are, at the same time, in receipt of the pay of their respective ranks or stations in the service; but it will be observed also that this inhibition is expressly restricted to the receipt of pension "as an invalid." The pension provided by the act of January 29, 1887, for the surviving officers and soldiers of the Mexican war is strictly and purely a *service* pension, is not given for nor by reason of any "disability" incurred in the service, and is not in any sense of the term an *invalid* pension; nor can the person in receipt of such a pension be held by any fair rule of construction to be in receipt of a pension "as an invalid." To so construe said section as to make the words "draw a pension as *an invalid*" applicable to those who are in receipt of pension for *service* merely, would be to inject into said section something that was not intended by Congress, nor placed therein by that body. It would be in effect "new legislation" by this Department, and therefore an unwarranted and illegal exercise of authority.

It may be remarked in this connection that, upon consideration of this motion, the same was referred by me to the Assistant Attorney-General of this Department for his consideration as to the legal questions involved, and in his opinion of August 25, 1888, he concurs in the views above expressed, saying:

It will be observed that this section only provides that "no person in the Army, Navy, or Marine Corps shall draw both a pension as an *invalid* and the pay of his *rank*," etc.

But said section does not place a pension for *service* on the same footing as an *invalid's* pension. Congress doubtless had a very good reason for not allowing a soldier, while receiving a pension because of disabilities rendering him unfit for military service, to draw at the same time, and in addition thereto, the same pay as if he *were* fit for such service.

But, whatever may have been the reason for making the distinction referred to, it most certainly exists. I am therefore of the opinion, upon the facts referred to in your communication, that applicant is legally entitled to the pension asked for.

For the above reasons the Department concludes that said departmental decision should be reconsidered, and the same is hereby overruled and set aside. Your action rejecting this claim, upon the ground heretofore set forth, is therefore reversed, and you are directed to issue to claimant a certificate granting him the pension for service in the Mexican war, provided for by said act of January 29, 1887.

LAWFUL ATTORNEY—ABANDONMENT.

JOSEPH H. HUNTER, ATTORNEY.

The neglect of an attorney, when called upon by the Commissioner of Pensions, to file additional evidence that may be necessary to the favorable adjudication of a claim, and the consequent necessity for the substitution and recognition of another attorney in the successful adjudication of said claim, should be construed as equivalent to the abandonment of the claim itself by the former attorney, and, therefore, to a forfeiture of his fee agreement for obtaining certificate of pension. The attorney who prosecutes the claim to a successful termination is the lawful one and entitled to the fee.

Assistant Secretary Hawkins to the Commissioner of Pensions, August 28, 1888.

Herewith are returned the papers which accompanied your report of July 28, 1888, upon the appeal of Joseph H. Hunter, attorney, of Washington, D. C., from your action refusing to recognize him as attorney upon the original issue of December 23, 1887, in the dependent pension claim, certificate No. 239,310, of Eliza Coan, mother of Samuel Coan, late private, Company F, Eighty-second Indiana Volunteers.

The appellant was duly appointed attorney, and filed declaration for claimant March 12, 1883. He prosecuted the claim and filed evidence therein on May 14, 1883, June 15, and July 20, 1885. On August 7, 1886, he was called upon by the Bureau of Pensions for additional evidence in the claim, but the records and the files in the claim fail to show that he ever filed the evidence called for.

October 20, 1887, one C. R. Wowall, as attorney for claimant, filed fee agreement and additional evidence in the claim upon which it was favorably adjudicated, and upon the issue of certificate, December 23, 1887, he was recognized as the lawful attorney of the claimant, certified, and paid the contract fee of $25.

From this action said Hunter appealed June 21, 1888.

Diligence on the part of the appellant in the prosecution of this claim would have been shown by a compliance with the call made upon him by the Bureau of Pensions for additional evidence, or by some evidence of an earnest effort upon his part to procure it, but can not be established by mere assertions that he was unable to communicate with his client, nor by the filing of any number of printed slips in the Bureau of Pensions stating he was not in fault.

The neglect of the appellant, as disclosed by the record and by the files, to prosecute the claim from July 20, 1885, to October 20, 1887, is, in default of sufficient cause shown therefor, conclusive evidence of abandonment of the claim by him under Rule 16 of Rules of Practice before the Bureau of Pensions, and your action in recognizing the said Wowall, certifying and paying to him the fee, was proper, and is affirmed.

INCREASE OF DISABILITIES—FEE AGREEMENTS.

MILO B. STEVENS & CO., ATTORNEYS.

The law provides that a contract for a fee of $25 may be filed and will be recognized in claims for increase on account of a *new* disability, but can not be recognized, nor will a fee of more than $10 be either certified or paid to attorneys, in claims for increase on account of the same disabilities for which pension has already been allowed. (See act of July 4, 1884.)

Assistant Secretary Hawkins to the Commissioner of Pensions, September 5, 1888.

I have carefully considered the motion for a reconsideration of departmental decision of August 14, 1888, affirming, on appeal, your action refusing to certify and pay to Milo B. Stevens & Co., attorneys of Washington City, D. C., a fee in the increase invalid pension claim, certificate No. 289,312, of David S. Snow, late private, Company G, Ninth Maine Volunteers, filed August 22, 1888, by said appellants.

The attention of the Department is called by said motion to the fact that, in 1885, the appellants had filed, on behalf of the claimant, a declaration for increase, based upon what they term a *new* disability, and in said declaration they had filed fee agreement and power of attorney from claimant; and, said power of attorney being on file at the time they filed the claim for increase now under consideration, upon the basis of the pensioned disabilities, they contend that it should be received as authorizing their prosecution of the latter claim, and as a sufficient compliance with the rules of practice in the Bureau of Pensions. Appellants urge that both of said applications for increase constitute the *whole claim* of the soldier, and that a power of attorney, filed in one, would relate to and be sufficient authority from the claimant to authorize their recognition as attorneys and the payment to them of a fee in the other; and they cite in support of this position departmental decisions which hold that attorneys will be required to prosecute under their fee agreements with claimants, for the single fee stipulated, all causes alleged and pending at the time said contracts were filed, or which were subsequently filed by them for the same party, and which were considered together and adjudicated by your Bureau as one claim.

The Department is unable to see the force of the afore-mentioned contention, nor the application of the afore-mentioned decisions to the question now under consideration.

The alleged claim for increase on the basis of a new disability was in the nature of an original claim, and would have to be proved up and adjudicated as such. It was entirely separate and distinct from the claim for increase based upon the pensioned disabilities of claimant, subsequently filed by appellants; and the Department has no hesitation in stating that, were said claim for new disability one in which a

contract for fee could be recognized, the appellants would unquestionably be entitled, upon its favorable adjudication, to their contract fee of $25, without reference to the subsequent claim of increase for the pensioned disabilities; and, if properly authorized to represent claimant in the latter claim, by power of attorney or by his subsequent ratification, as required by Rule 1 of Rules of Practice in Pension Claims, they would also be entitled, upon the allowance of the claim, to the statutory fee of $10.

The marked distinction between these two classes of claims for pension is distinctly recognized by the act of July 4, 1884, it being therein provided that contracts for a fee of $25 may be filed and will be recognized in claims of increase for a new disability, but can not be, nor will a fee of more than $10 be certified or paid to attorneys, in claims for increase of disabilities for which pension has already been allowed.

The two claims for increase being thus entirely separate and distinct, it follows necessarily that the power of attorney filed by the appellants in the new disability claim, in 1885, can have no possible relation to nor bearing upon the claim of increase for the pensioned disabilities filed in 1887, nor would it confer upon them any authority to represent the claimant in the latter claim, which was not in existence, possibly not in contemplation, at the time the former was executed.

The claim filed in 1887 must stand alone, so far as appellants' right to recognition as attorneys therein is concerned; and the failure to provide therein for the payment of their fee, by a compliance with the requirements of the rule above referred to, can not be cured by filing long previously a power of attorney in another and separate claim for the same claimant, but having no other connection with it.

The attention of the appellants is invited, in this connection, to the fact, disclosed by an examination of the record, that they were the original attorneys of this claimant, that they prosecuted his original claim for pension, and that, in the original declaration, they alleged not only the disability of rheumatism, for which pension was allowed, but also the chills and fever which they re-alleged as a new disability in the claim for increase filed by them in 1885, and in which the power of attorney and fee agreements relied upon by them herein were filed. The departmental decisions cited by appellants, and hereinbefore referred to, apply directly to this state of facts. There was no necessity for them to re-allege said disability in a new declaration, nor does the filing of such a declaration constitute it a new disability in the sense to entitle them to an additional fee, but they will be required, in accordance with said departmental decisions, to prosecute to a final determination all the pensionable causes alleged in said original declaration for the fee of $25 contracted for in said original claim, and which has already been paid them.

For the above reasons, said departmental decision will be adhered to and the said motion overruled.

AFFIDAVIT—HOSPITAL RECORD—SECOND ENLISTMENT.

FRITZ MUELLER.

1. Claimant's affidavit as to incurrence of disability must be sustained and corroborated by the surrounding circumstances, and be entirely consonant with the record in his case, if unsupported by other evidence.
2. The hospital record, made during service, is presumably correct as showing all diseases or disabilities, as well as the medical treatment, which claimant had in the service; and where, years after his discharge, claimant alleges a disease or disability of which the hospital record contains no mention, and of which there was no evidence at discharge, the presumption is that said disability was not incurred in the service
3. A second enlistment raises the presumption that claimant had recovered from whatever pensionable disease or disability he may have contracted in his first service.

Assistant Secretary Hawkins to the Commissioner of Pensions, August 15, 1888.

I have considered the claim of Fritz Mueller, late private, Company H, Sixth Ohio Cavalry, and Company H, Sixteenth United States Infantry (claim No. 460587), on appeal from your decision of August 13, 1887, rejecting his claim for invalid pension on the ground of his "inability to furnish proof showing that the injury alleged was contracted while in the service."

Claimant appealed July 11, 1888, upon the ground that the testimony of himself, together with the record, should be held sufficient to establish his claim.

Soldier first enlisted March 1, 1865; was discharged June 6, 1865; re-enlisted November 27, 1865, and was again discharged March 7, 1867. He filed his declaration for pension, September 16, 1882, for injury to right foot, received while in the service and line of duty at City Point, Va., in March, 1865. He alleges that "whilst under orders—saddling horses—a horse accidentally stamped on his right foot, permanently disabling same."

The records of the War Department show that claimant "enlisted March 1, 1865, and was mustered out June 6 of that year, at Mower General Hospital, Philadelphia, Pa.; also, that, on the 15th of April, prior to his discharge, he entered the Cavalry Corps Hospital, at City Point, Va., with an incised wound of the right foot; entered steamer *State of Maine*, at said place, on the third day thereafter, with a gunshot wound of the left foot; Harewood General Hospital, Washington, D. C., on the 19th of the same month, with an accidentally incised wound of right foot, made by an ax, January 13, 1865; and Mower Hospital, Philadelphia, Pa., on the 19th of the following May, with an ax wound of the right foot, received on the preceding 20th of January, at Petersburgh, Va."

It is further shown that the claimant was "enrolled November 27, 1865, in Company H, Third Battalion, Sixteenth United States Infantry (subsequently Thirty-fourth United States Infantry), and was discharged March 7, 1867, upon a surgeon's certificate of disability, on account of ulceration of the right foot, resulting from a wound received in the German army. Said certificate also shows that the claimant alleged that he was wounded in the foot while in the German army, about seven years prior thereto, but that, upon entering the United States service, the wound was entirely healed and did not disable him. The records indicate that during his last service he entered the post hospital at Nashville, Tenn., September 28, 1866, with an ulcer on one of his feet."

It is shown by the certificate of the medical examination made in the case, June 18, 1885, that "the claimant has a cicatrix on his right foot about an inch in length, which runs lengthwise, and that just below said scar is a prominence, another inch in length, which includes the upper ends of the metarsal bones of the second and third toes, and that the fourth toe is in a measure contracted."

The certificate of the surgeon attached to his discharge from the regular Army, March 7, 1867, states that claimant was incapable of performing the duties of a soldier because of the ulceration of right foot—so much so as to prevent him walking without the aid of a stick. The certificate for discharge contains also the statement that "soldier says he was wounded in the foot in the German army about seven years ago, but, at the time he enlisted in the United States Army, the wound was entirely healed, and was of no injury to him."

The only evidence of claimant's injury, as alleged, consists of his uncorroborated affidavit. In his application for pension he admits that he is unable to fix the date on which he received his disability. The evidence is clearly insufficient and does not establish the claim. His affidavit is unsupported by any medical testimony; it is not corroborated by his officers, by his comrades, by surrounding circumstances, nor by the record. In this respect his case is similar to that of Edward H. Bonton, decided by the Department February 8, 1888. (See 2 P. D., p. 23.) It was contended in that case, as in this, that appellant's own testimony, and the secondary evidence produced, should be accepted to establish the incurrence of his injury; but the Department, affirming the case of John Richards (vol. 1 P. D., p. 235), uses the following language:

> Before the statements of appellant alone can be accepted as sufficient to establish the incurrence, they must be sustained and corroborated by all the surrounding circumstances, and must be in entire consonance with the statements of the record.

The hospital record is adverse to claimant's theory and makes no mention of his injury, such as he claims to have sustained; and in this regard the case is determined by the decision of the Department in the claim of William Waterbury (vol. 2 P. D., p. 53). In the case of Levi Connor (vol. 2 *P. D., p. 1) the* Department held that "the hospital record

made during service is presumed to be correct as showing all the diseases or disabilities and treatment which soldier had during the service; and where claimant, years after his discharge, alleges a disease or disability of which his hospital record contains no mention, and of which also there was no evidence apparent at discharge, the presumption is that said disease or disability was not incurred in the service, but subsequently to his discharge, and is not, therefore, pensionable." (Arad P. Brown (vol. 2 P. D., p. 88.)

The fact that claimant re enlisted after the incurrence of his alleged disability, served for over a year, and delayed for over fifteen years to file his application for pension, raises a strong presumption against him. In the case of John H. McLaughlin (vol. 2 P. D., p 85) the Department reaffirms the doctrine uniformly held, that "a second enlistment raises the reasonable presumption that claimant had recovered from any disability he may have incurred in his first service." This presumption will stand until clearly disproved. (David G. Rummel, vol. 2 P. D., p. 91, and John C. Brown, vol. 1 P. D., p. 321).

It is apparent from the foregoing considerations that the rejection of this claim was not error, and the action of your office is, therefore, affirmed. The papers in the case accompanying your letter of transmittal of August 6, 1888, are herewith returned.

FEE AGREEMENTS.

W. H. DEAVER, ATTORNEY.

Fee agreements which are not executed in accordance with the specific requirements of law can not be recognized by the Department; and claims in which such defective agreements are filed must be considered as though no fee agreement had been filed, but in which the law authorizes a fee not exceeding $10.

Assistant Secretary Hawkins to the Commissioner of Pensions, August 28, 1888.

Herewith are returned the papers which accompanied your report of July 31, 1888, upon the appeal of W. H. Deaver, attorney, of Asheville, N. C., from your action refusing to certify him a fee in excess of $10 in the claim of Marcus L. Penland, certificate No. 395791.

Claimant's original declaration for pension was filed May 16, 1884, through Hon. Robert B. Vance, a member of Congress.

March 23, 1886, the appellant filed a power of attorney from claimant, and, on the same date, he filed a single unattested fee agreement for $25. He prosecuted the case under the power of attorney to a successful issue, and, on May 17, 1888, he was certified and paid a fee of $10. From the refusal of the Bureau of Pensions to recognize the fee agreement filed by him, he appealed July 16, 1888.

The act of July 4, 1884, requires that articles of agreement for fees in *pension cases* shall be filed in duplicate and that the Commissioner of

Pensions shall furnish one copy of said agreement to the agent for paying pensions. Said act also provides that said articles of agreement shall be executed by the claimant in the presence of and attested by two witnesses, and acknowledged also before some officer competent to administer oaths.

Fee agreements which are not executed in accordance with the requirements of the law can not be recognized; and claims in which such agreements are filed must be considered as though no agreement had been filed, and in which the law does not authorize the payment of a fee in excess of $10.

The fee agreement filed by the appellant in this case was not only not filed in duplicate, but not properly executed by claimant in the presence of two witnesses, nor attested by them as the law requires, and, hence, it can not be recognized by you.

You properly treated the claim as one in which no fee agreement had been filed, certified to appellant the maximum fee authorized by the law in such a case, and your action is affirmed.

FULFILLMENT OF FEE AGREEMENTS.

MILO B. STEVENS & CO., ATTORNEYS.

The Department holds that when a claim is made on account of two or more disabilities and a certificate issued for pension on account of one disability, the attorney's work is not done if claimant desire to prosecute the claim on account of the other disabilities. The attorney's contract with the claimant is construed as an agreement to prosecute the claim on account of both or all the disabilities named therein, and claimant is not required by law to pay more than one fee for the entire service.

Assistant Secretary Hawkins to the Commissioner of Pensions, September 3, 1888.

Herewith is a letter in which Milo B. Stevens & Co., of Cleveland, Ohio, request this Department to reconsider its decision affirming the action of your office in the matter of the fee for the prosecution of the pension claim of Philip Steinhizer, certificate No. 170973.

The facts in that case were as follows: The said Steinhizer had pending a claim for pension for wound of right arm and disease of leg, when, in 1876, Messrs. Milo B. Stevens & Co. filed a power of attorney and duplicate articles of agreement for a fee of $25. The claim on account of the wound of arm was allowed by certificate dated June 30, 1880, and the fee of $25 was paid to Milo B. Stevens & Co. They prosecuted the remaining portion of the claim, and, in September, 1885, a new certificate was issued to grant additional pension on account of disease of leg. The articles of agreement for a fee of $25, filed May 24, 1885, were not recognized, and no fee was paid upon the second issue of the

certificate, your office holding that the attorneys had been fully paid for their services at the first issue of the certificate; and, as it appeared that they had received a fee of $10 directly from the claimant, they were required by your office to refund that amount.

In the decision dated November 15, 1886, this Department affirmed the action of your office denying a fee on the second issue of the certificate and requiring the attorneys to refund $10 received by them while the fee act of June 20, 1878, was in force. Referring to the remark of the appellants that, "by experience, had since the original decision, the Department can now better address itself to the questions involved," I have to state that experience has confirmed the justice of that decision.

The appellants err in the statement that, in the decision concerning the payment of the fee in the pension claim of Daniel L. Barker, it was held by the Department that a contract for the prosecution of a claim in which two or more disabilities are alleged is fulfilled when a claim for one of the disabilities is established. On the contrary, it was distinctly held in that case that when a claim is made on account of two or more disabilities, and a certificate is issued granting pension on account of one disability, the attorney's work is not done if the applicant desires to prosecute the claim on account of another disability alleged. The action of the Pension Office in issuing the certificate upon a part of the claim could not release the attorneys from their obligation under contract with the claimant. On the contrary, it is the duty of the Pension Office to see that the contract is observed, and that a claimant is not required to pay an attorney more than one fee in one claim.

In regard to the objection of the appellants to that part of the decision affirming the action of the Pension Office requiring them to refund the sum of $10, received by them under the act of June 20, 1878, I have to state that the Department adheres to the view that the two alleged causes of disability constituted but one claim, and that therefore it was its duty to see that the fee in the case should not exceed $25—the limit fixed by the law.

The fact that the applicant did not require the attorneys to prosecute both parts of his claim for one fee, but was willing to pay an additional amount, has no bearing upon the case. It was the duty of the Pension Office and of the Department to see that but one fee was paid to the attorneys for their services in a single claim.

It is an objection to the practice under the decision in the claim of Daniel L. Barker that a new attorney may come into a claim to prosecute the portion of it remaining unadjudicated at the time of the issue of the first certificate, and that the payment of an additional fee may be required. It is the duty of the Pension Office, however, to see that attorneys fulfill the obligations of their contracts with claimants in regard to the prosecution of claims. The decision heretofore rendered in the matter of the payment of the fee for the prosecution of the claim of *Philip Steinhizer* is therefore adhered to.

ORIGIN OF DISABILITY—SECOND ENLISTMENT.

EVERETT CAWOOD.

Where claimant alleges, as basis for pension, the incurrence of a disability in his first service, and it appears that he re-enlisted and served without a record of any disability, the second service raises the presumption that no pensionable degree of disability was incurred in his first service, and such presumption is rendered conclusive by the absence of all testimony showing a pensionable disability at discharge.

Assistant Secretary Haskins to the Commissioner of Pensions, September 20, 1888.

Herewith are returned the papers which accompanied your report of September 12, 1888, upon the appeal of Everett Cawood, late private, Company D, Ninth Indiana Volunteers, from your action rejecting his claim for invalid pension, No. 258854.

Appellant alleged, in declaration filed August 3, 1878, that he was ruptured on the left side and received a fracture of the right hip on or about the last of May, 1862, by being thrown out of a wagon while on detached service.

The records of the War Department show that appellant enlisted August 27, 1861, and was reported present from enrollment to April 30, 1862; May and June, 1862, "absent on detached service;" and returns for May, 1862, do not report him absent, sick, nor otherwise. Regiment was stationed near Corinth, Miss., May 31, 1862. July and August, 1862, absent on detached service; so reported to August 31, 1864. Muster-out roll of detachment, *dated September 6, 1864, reports him mustered out on that date*, at Chattanooga, Tenn., by reason of expiration of term of service. The records furnish no evidence of the alleged injuries. They further show that appellant re-enlisted in Company F, One hundred and fiftieth Indiana Volunteers, on February 10, 1865, for one year, and was reported on roll to June 30, 1865, present; that he was discharged, to date July 27, 1865, mustered into the service July 28, as second lieutenant of same company and regiment, and that he was mustered out with company August 5, 1865. No evidence of disability.

The claim was rejected January 24, 1887, after a thorough special examination, upon the ground that there is no record, and the evidence, which appears to be the best obtainable, fails to show the origin of the alleged disabilities—rupture of left side and fracture of left hip—in the service and line of duty. Since the rejection, appellant filed additional testimony, which was duly considered and the former action of rejection was adhered to, July 23, 1888.

From that action claimant appealed.

OPINION.

It is shown *by the records* of the War Department that appellant *had two terms of military* service, and he alleges the incurrence of his

injuries during the term of his first service. In his declaration, filed August 3, 1878, he alleges that he was ruptured on the left side and received a fracture of the right hip on or about the last of May, 1862, by being thrown out of a wagon while on detached service.

The evidence on file tending to prove the incurrence of the alleged disabilities, other than his own statements, depends entirely upon the testimony of three comrades, viz: George W. Baker, of Company A; John H. Violett, of Company E; and George W. Smith, of Company G—all of the Ninth Indiana Volunteers.

Comrade Baker testifies that he was but a short distance from appellant when he was thrown to one side of his wagon, and saw him ten or fifteen minutes afterwards, when he complained of his hip and abdomen. The testimony of this witness is wholly discredited by the records of the War Department, which show him with his company for the months of April, May, and June, 1862, and not where he states he was the last of May, 1862.

Comrade Violett, in his deposition before the special examiner, so modifies, changes, and contradicts his former statements, as contained in his affidavit originally filed in the claim, as to render said testimony utterly worthless, and therefore entirely insufficient to support the allegations of the appellant as to incurrence.

Comrade Smith testifies as to injury to hip and abdomen, but does not state he had personal knowledge of the fact.

F. W. Fee, late quartermaster First Kentucky Volunteers from July, 1861, to July, 1864, testifies that he knew appellant who was detailed under him in April, 1862, as a teamster; that to the best of his recollection, on the march to Iuka, near Corinth, appellant and several other drivers got drunk, and while crossing a corduroy road fell off their mules and wagons and were hurt; that he did not consider appellant very seriously hurt, as he was off duty only a few days and seemed all right afterwards; never heard that he was ruptured at the time or that any bones were fractured.

This condition of the testimony, taken in connection with the entire absence of any record of said disabilities, would be sufficient to warrant a rejection upon the ground that the incurrence of said injuries in the service and line of duty had not been proved; but, in addition to the foregoing, there is involved another element which is fatal to appellant's claim.

It appears from the record that appellant re-enlisted in the service February 10, 1865, and served until August 5, 1865, without record of any disability during said time. This second service raises the presumption that no pensionable degree of disability was incurred in his first service, which presumption is rendered conclusive by the absence of any testimony showing such a degree of disability at discharge.

The Department has held in a number of cases that "a second enlistment raises the presumption that if any disability had been contracted

in the first service the claimant had recovered from it, and this presumption will stand until clearly disproved." (See cases of Taylor, John T., vol. 1 Pension Decisions, p. 281; Gemberling, George W., *id.*, p. 213; Taylor, Wesley W., *id.* p. 359.)

For the reasons hereinbefore given, the Department is clearly of the opinion that your action rejecting this claim upon the grounds stated in your report herein was correct, and it is therefore affirmed.

ORIGIN OF DISABILITY—SEQUENTIAL DEATH-CAUSE.

MARY, WIDOW OF STEDMAN B. FARRAR.

1. The certificate of disability for discharge of soldier, being a contemporaneous official record, is presumably correct as setting forth the entire cause of soldier's disability at the time; and where the disease causing death is neither mentioned nor indicated in the certificate, that fact will afford a strong legal presumption that said disease did not exist in a pensionable degree, if at all, either in the service or at discharge.
2. Lay testimony, taken years after soldier's death, can not be accepted as establishing the facts alleged, unless supported by the record or by direct medical evidence.
3. To entitle a widow to pension, the soldier's death must have been the natural, direct, or proximate result of wounds, of injuries, or of disease incurred in the line of duty; and, if the immediate death-cause arising after discharge be alleged as the result of a disease contracted in the service, the one must be proved to have been so ingrafted upon the other as to render the two inseparable as the sequential cause of death.

Assistant Secretary Hawkins to the Commissioner of Pensions, August 29, 1888.

I have considered the claim of Mary, widow of Stedman B. Farrar, late private, Company B, Fifth Michigan Infantry (Claim No. 320,515), of July 18, 1888, on appeal from your decision of July 18, 1888, rejecting her claim for widow's pension upon the ground that "the soldier died of acute pneumonia, which is not shown to have been ingrafted upon any previously existing disease of the lungs incurred in the service."

The questions involved in this case relate to incurrence, continuance of disability, and cause of death.

Soldier enlisted August 28, 1861, was discharged October 1, 1862, and died March 19, 1884, of pneumonia of two weeks' duration, without having made any application for pension.

Claimant filed her declaration for widow's pension, October 18, 1884, alleging death as the result of chronic diarrhea and lung disease, contracted in the service in September, 1862.

The Adjutant-General's report shows that the "soldier was enrolled, August 28, 1861." He was reported on the rolls of his organization, for September and October, 1861, "absent on detached service;" for November and December, 1861, "present," and so reported to April 30, *1862; for May and June*, 1862, "absent, sick, since June 12, 1862;"

for July and August, "absent, sick, in general hospital since July 4, 1862;" and was discharged from service, at the Cliffburne general hospital, at Washington, D. C., October 1, 1862, on a certificate of disability, in which the surgeon in charge stated that he found the soldier incapable of performing the duties of a soldier because of "inguinal hernia, wholly unfitting him for duty, contracted at Fair Oaks." The Surgeon-General's report shows that soldier was admitted to the Cliffburne general hospital, in District of Columbia, July 7, 1862, with "chronic rheumatism," and was discharged from said hospital and the service, October 1, 1862. The records furnish no evidence of the alleged chronic diarrhea, nor of lung disease, nor further evidence bearing on the case, except that soldier was given October 1 and 2, 1862, tincture of chloride of iron and compound cathartic pills.

There is no record nor medical evidence tending to show the incurrence of either of these diseases or of the alleged disability resulting therefrom in his certificate of discharge from the service. The claim in this regard comes within the rulings of the Department in the case of Arad P. Brown (2 P. D., p. 88). In that case, claimant sought to establish his claim for restoration and increase of pension, alleging as a new disability sciatic rheumatism. The following is the language of the Department in the case above cited, bearing upon the point in issue:

> In the second place, the appellant endeavors to establish the origin and existence in the service of the alleged rheumatism by the vague and uncertain testimony of comrades alone, given many years afterwards. The records of the War Department furnish no evidence either corroborating the testimony of said comrades or showing the existence of the alleged disease in the service; and appellant admits his inability to produce any medical testimony showing treatment therefor during his service. Such testimony, unsupported by the record or by medical evidence, is, as the Department has decided in a number of cases, not sufficient to establish origin in the service. In the case of McIntire (1 P. D., p. 20) it was held: Lay testimony, when unsupported by the record or by direct medical evidence, and which is dated years after claimant's discharge, can not be accepted as proof of the incurrence of the alleged disability in the service.

See also, to the same effect, the cases of Dodge, John W. (1 P. D., p. 211), and Fallada, Franz (*id.*, 273). See also the case of Tobias Baney (1 P. D., p. 342) and that of Mary A. Maybury (*ibid.*, p. 437).

The certificate of disability contained in soldier's discharge from the service shows his disability to have been inguinal hernia, contracted in the service and in line of duty at Fair Oaks, and caused by the weight of his cartridge-box and by hard marching about May 30, 1862. No reference is made to any other disability.

In the case of Alonzo F. Westcott, decided by the Department, September 30, 1887, it was held that "statements contained in the certificate of disability upon which soldier was discharged from the service are not only sufficient to overcome the presumption of prior soundness, but fully establish the facts therein stated until overthrown by unquestionable evidence;" and the disabilities mentioned in the certificate *of discharge* are presumed to embrace all the disabilities with which

claimant was suffering (1 P. D., p. 316). This ruling was affirmed in the case of Edward H. Bonton (2 P. D., p. 23).

In the case of William Waterbury (2 P. D., p. 53) the Department held that disabilities "must be proved to have originated in the service and in line of duty; and, where there is a hospital record in the service at the time when the disabilities are claimed to have existed, the failure of said record to mention said disabilities is taken as conclusive evidence adverse to the origin of same in the service. In support of such a claim lay evidence in insufficient."

Regarding the lay testimony in this case, the strongest evidence of the disability in the service is that of claimant's captain, who testified before a special examiner, June 8, 1888, as follows:

If I remember rightly he had some lung trouble and perhaps diarrhea, as there was a great deal of that trouble amongst the men; he was broken down at least, and I did not consider him fit for duty, and directed him to report to the surgeon. This was just as the seven days' fight began, and he was sent to the rear, and I never saw him afterwards in the regiment. * * * After the war I saw my brother; we did not live in the same vicinity, but I saw him occasionally. He was not a man to complain much. I noticed that he was taking medicine, though. I have no distinct recollection as to the trouble he had; I think it was perhaps some throat difficulty.

Before the special examiner, June 27, 1888, six of soldier's comrades who knew him in the service testify to his apparent freedom from any complaint. They do not recollect that he had a cough or difficulty with his lungs of any kind, or that he was suffering from chronic diarrhea.

Soldier's brother-in-law testified before special examiner at the same time that he knew soldier before and after enlistment; that he "saw him shortly after discharge; did not know that there was anything the matter with him at that time. I think I saw him every year since discharge until about five years ago. I do not remember that he had any physical difficulty or any disease. It seems to me that, if there had been anything of a serious nature the matter with him, I should have heard it."

Not only is there a failure to prove incurrence of either chronic diarrhea or lung disease while in service, but the testimony also fails to show a continuance of either of said diseases subsequent to his discharge. The claimant testifies that she did not know of soldier having diarrhea until a short time before his death, but that his difficulty of lungs exhibited itself soon after marriage. Even assuming that soldier incurred the disabilities, as alleged, while in the service, and that they continued from date of his discharge until his death, the Department would not be warranted in holding that pneumonia was the result of said disabilities.

In the case of Elizabeth Hoy, decided by Secretary Schurz, June 5, 1877, her husband was, at the date of his death, a pensioner on account of disability resulting from chronic diarrhea. He died of pneumonia. In deciding the case, the Secretary said:

The attorneys argue that the attack of pneumonia was indirectly connected with the service; that it was superinduced by the debilitated condition of the system

caused by long-continued diarrhea. The physician who attended the husband in his last illness testified that the immediate cause of death was pneumonia, but that the pulmonary inflammation was not of such extent or of such severe character as probably to have been fatal, had not his constitution been broken down by previous disease. The feeble and the robust are alike subject to acute inflammation; the connection, therefore, between the attack of pneumonia and the previous condition of the patient, if any such connection existed, is not susceptible of such proof as would justify the allowance of a pension on the ground that the acute attack was the result of the condition of health previously existing. It may be presumed by Dr. Roberts that the acute attack would not have been fatal if the constitution had not been broken down previously by existing disease; but a connection between the fatal disease and the service, based upon such reasoning, is too remote and uncertain to bring the case within the provisions of law. The decision of your office rejecting the claim is therefore affirmed.

In the case of Jane E. Hallett, decided by Secretary Schurz, June 20, 1877, the question involved being whether pneumonia was the result of disabilities in the service, the Secretary said:

But if the origin in the service of the alleged remote cause had been satisfactorily established, the theory upon which it is attempted to connect the immediate cause of death with the military service of the soldier can not be accepted.

Pneumonia, in order to be pensionable as a result of disease of lungs, must be so ingrafted upon the previously existing disability as to show that death was the result of or occasioned by disability contracted in the service.

In the case of Eliza Cloudman, the proof showed that the husband of claimant was pensioned for hernia. In 1867 he applied for an increase, alleging, among other causes of disability, chronic catarrh, the result of a severe cold contracted while a prisoner in Libby prison. Upon a medical examination, the surgeon reported in favor of an increase on account of said chronic catarrh. The medical examination also shows claimant was suffering from inflammation of the lungs in 1864; that, from 1865 to 1871 he suffered with chronic inflammation, with hepatization; in 1873 he was found to be suffering from *emphysema*, *dyspnea*, *purulent* expectoration, and symptoms indicating long-standing disease of the lungs, not amenable to any treatment which would produce any good result. Pneumonia supervened, gangrene of the lungs was developed, and caused death on the 18th of January, 1877. With these facts before it, the Department, by Schurz, Secretary, in deciding the case, rendered the following opinion:

It appears that the fatal attack of pneumonia was ingrafted upon previously existing incurable disease of lungs. In the view of the Department, the evidence sufficiently shows that the disease which caused the death of said Cloudman was so connected as a result of his military service as to entitle his widow to a pension. (See decision of Secretary Schurz, April 26, 1878, vol. 5, Departmental Decisions, p. 47.)

It is a well-established rule of the Department that in order to entitle a widow to a pension under the law, death must have been the natural, direct, or proximate result of wounds or injuries received or of *disease contracted* while in the service. (See case of Sarah A. Stack, *decided by* the Department July 23, 1888, 2 P. D., p. 153.)

In view of the foregoing precedents and rulings, applicable to this appeal, the action of your office in rejecting the claim was not error, and your decision is therefore affirmed. The papers in the case accompanying your letter of transmittal of August 22, 1888, are herewith returned.

SUICIDE—INSANITY—MEDICAL OPINIONS.

MARGARET, WIDOW OF ADAM MAYER.

Medical examinations of deceased soldier having failed to detect the relation of cause and effect between a gunshot wound for which he was pensioned and the insanity which soldier's widow alleges as the cause of his suicide, the appeal is denied under the settled practice of the Department to be guided by the opinions of its medical advisers in determining questions of a purely medical character.

Assistant Secretary Hawkins to the Commissioner of Pensions, September 16, 1888.

Herewith are returned the papers which accompanied your report of August 28, 1888, upon the appeal of Margaret Mayer, widow of Adam Mayer, deceased, late private, Company H, Twenty-fourth Ohio Volunteers, from your action rejecting her claim for pension.

Soldier enlisted April 24, 1861, and was discharged from the service July 1, 1862. He was pensioned at the time of his death at the rate of $16 per month, for gunshot wound of right arm and shoulder, and died March 12, 1886.

The claimant filed her declaration for pension as widow of soldier, December 6, 1886, alleging that the soldier died at Oneida, N. Y., upon the date aforesaid, from suicide, committed while insane, his insanity having been caused by the gunshot wound for which he was pensioned. Her claim was rejected June 23, 1888, upon the ground that soldier's suicide could not be accepted as a result of gunshot wound of right arm and shoulder for which he was pensioned, nor as otherwise due to his military service.

From said action of rejection claimant appealed July 28, 1888, contending that it has been fully shown by medical testimony that insanity which caused the soldier's death was due to the gunshot wound for which he was pensioned, and that she was therefore entitled to pension as claimed.

OPINION.

The circumstances of the soldier's death are not fully disclosed by the testimony on file, but it appears that he committed suicide while suffering from an attack of mental aberration on or about March 12, 1886.

The application of the appellant for pension is based upon the theory that the insanity of the soldier was directly caused by and was the result of gunshot wound for which he was in receipt of a pension at the *time of his death. This* is the decisive question presented upon this

appeal, and, from the mere statement of it, is of a purely medical character and must be determined by medical testimony.

In support of her claim, the appellant has filed the affidavits of two physicians who attended the soldier at various times, and who testify to his being subject to attacks of insanity from time to time, and that his mind was unbalanced for years prior to his death. Both of them assert in general terms their belief that the soldier's mental disease was the result of the wound above referred to, but fail to tell how said wound could affect the soldier in this way, or to give any reason for their conclusions. On the other hand, it appears from the record that the soldier during his lifetime, and while in receipt of pension for said gunshot wound, was subjected on numerous occasions to medical examinations by examining surgeons and boards of surgeons of the Bureau of Pensions, whose certificates of said examinations contain full and exhaustive descriptions of said wound, its character, and its effects upon the soldier, and also give a complete diagnosis of his physical condition; but said certificates wholly fail to show that said wound in any manner affected the spinal cord or neck (as stated in affidavits by said physicians), or that in any other manner it was either connected with the mental condition of the soldier or resulted in any affection or disease of the brain.

In course of its adjudication by you, this claim, together with all the medical evidence above referred to, was properly referred to the medical referee of the Bureau of Pensions for his opinion as to whether the insanity of the soldier could be ascribed to his pensioned disability. That officer, after having subjected the claim to careful review and consideration, held, in an opinion of May 15, 1888, that insanity—the alleged cause of soldier's death—could not be medically accepted as the result of the pensioned wound.

It is the settled practice of the Department to be guided in the determination of questions purely medical by the opinions of its medical advisers, and to accept as generally conclusive the opinions of the medical referee when based upon the results of medical examinations. (See cases of Gaskell, Lucinda, vol. 1 P. D., p. 29; Preston, Patrick, *id.*, p. 41; Douglass, John, *id.*, p. 52; Garrison, Wm. H., *id.*, p. 262; Faulkner, Joseph F., *id.*, p. 292; Romine, Uriah W., *id.*, p. 299.)

This claim is to be distinguished from the case of Mary A. Buker (vol. 1, P. D., p. 108), in which it was held by the Department that the widow of a soldier who committed suicide while insane was entitled to pension for the reason that, in said case, it was clearly proved by medical testimony and held by the medical referee that the insanity of soldier was a direct pathological *sequence* of the disability incurred by the soldier in the service.

For the reasons above stated, and in view of the foregoing well-established rule, the Department is of the opinion that your action rejecting *this claim* upon the grounds stated in your report was proper, and it is *therefore* affirmed.

LOSS OF MONEY—AGENT—LIABILITY.

ELLEN PETTIT, WIDOW OF JERRY PETTIT.

It appearing that widow's arrears of pension had been duly certified by the Commissioner, that the amount had been paid by check at the proper pension agency, addressed to the long recognized and well-known agent of claimant, and in conformity with her own directions to the aforesaid pension agency, but that the money had been misappropriated or miscarried, or at any rate not received by claimant, it is held that the liability of the Government had ceased with the aforesaid payment, and that neither the Commissioner of Pensions nor the Secretary of the Interior can afford relief for claimant's loss.

Assistant Secretary Hawkins to the Commissioner of Pensions, September 8, 1888.

Herewith are returned the papers which accompanied your report of August 31, 1881, upon the appeal of Ellen Pettit, widow of Jerry Pettit, deceased, late private, Company C, Sixty-third United States Colored Troops, from your action rejecting her claim for arrears of pension.

The claimant is in receipt of a pension granted to her on the 15th day of April, 1872, at the rate of $8 per month, and commencing on the 23d day of August, 1871.

On March 14, 1879, there was filed in your Bureau an application by the claimant for arrears of pension, under the act of January 25, 1879. Said application was executed by claimant on March 4, 1879, before one C. E. Bent, a United States commissioner for the southern district of Mississippi, who certified that claimant signed (by mark) said application in his presence, was known to him to be the person described therein, and that at the time of executing said application she exhibited to him her pension certificate, No. 157301. In said application claimant's post-office address is given as Vicksburg, Warren County, Miss., care of lock box 58, and her signature by mark to said application was witnessed by King Dorwart and A. Thompson.

On September 25, 1879, a reissue of certificate under said application was made to claimant for arrears due her, amounting to $730.87. Said certificate was sent to the pension agent at Knoxville, Tenn., and October 21, 1879, a voucher for said amount was executed and signed by appellant (by mark), her signature being witnessed by A. Thompson and C. E. Bent. Said voucher was also executed before C. E. Bent, United States commissioner, Vicksburg, Warren County, Miss., and claimant was identified by Allen Champs and Mary Dott, both of whom signed (by mark), and their signatures were witnessed by A. Thompson. In this voucher apellant's address was given the same as stated in her aforesaid application for arrears. Upon the receipt of this voucher, the pension agent at Knoxville, Tenn., drew his check, No. 145051, October 21, 1879, for $730.87, upon the Assistant Treasurer of the United States at New York, payable to the order of claimant, and mailed the same *to her upon that date,* to the address given in her said applica-

tion for arrears and in said voucher. Said check was paid by the Assistant Treasurer of the United States at New York City, on November 3, 1879, and was indorsed by claimant, by mark, and witnessed by C. E. Bent, Vicksburg, Miss. It also appears by indorsement upon said check that it passed through the Mississippi Valley Bank, Vicksburg, and the Hanover National Bank of the City of New York.

On January 25, 1887, appellant again filed in your office an application for said arrears of pension, through one, W. Miller, her attorney, of Vicksburg, Miss. In a letter filed February 18, 1887, she states that this latter application was filed in order to obtain the arrears of pension due her from April 18, 1865, to August 22, 1871, and that the arrears of pension allowed her under date of September 25, 1879, she had never received. In a letter filed April 27, 1887, she further states that she never made application for arrears through said Charles E. Bent; that the said Bent told her there was more money coming to her, but she did not make for it an application.

In view of the foregoing second application for arrears of pension, and the statements of appellant, a special investigation of the matter was directed by you, December 10, 1887, to ascertain, if possible, whether claimant be entitled to arrears, whether payment had been made to the wrong party, and, if so, to locate such party with a view of demanding and procuring the refunding of the money thus fraudulently obtained, and for such other action as might be deemed necessary to a proper understanding of the facts. Upon the return of the testimony obtained on said special examination, and after careful consideration of the same, said application for arrears of pension, filed January 25, 1887, was rejected by you on March 19, 1888, for the reason that said arrears of pension had already been allowed, that a certificate therefor had been issued to claimant, that said arrears of pension had been paid, and that your Bureau could afford the pensioner no relief from her loss, if the same had not been actually *received* by her.

From said action of rejection she appealed, May 21, 1888.

OPINION.

The question presented upon this appeal is not, primarily, whether the appellant would be entitled to repayment of the amount of arrears allowed her by your issue of September 25, 1879, and paid by the check of the pension agent above mentioned, nor as to who would be liable for the repayment of the same in case it were satisfactorily shown never to have been received by the appellant, but, as to whether or not your action, rejecting her second application for said arrears, was proper.

It would be a sufficient answer to this question to state that, the former claim having been regularly allowed and a certificate issued therefor, no second claim for the same thing could be entertained, and the matter of the miscarriage and non-receipt of the money by appellant would

not necessarily arise in the determination of the questions now before the Department.

In view, however, of the fact that the question of the right of the appellant to repayment and the liability of the Government for the alleged non-receipt of said money by appellant has been considered by your Bureau, and is so closely connected with the question above stated, and in view of the further fact that the recovery of said amount is really what is sought by the appellant in this appeal, it may be well to determine whether, under the circumstances of the case, the Government would be held bound to make good to the appellant her loss, if any occurred.

It is admitted by the appellant in her testimony before the special examiner that the said C. E. Bent, who, she alleges, fraudulently obtained the amount paid her as arrears of pension and appropriated it to his own use, was her agent and attorney for the transaction of her business with the Bureau of Pensions, that he had been such for a number of years, that she had been accustomed to have all communications to herself from said Bureau addressed to the care of the post office box of said Bent, that the same were received and opened by him with her consent, and that he had been accustomed to cash her checks for the quarterly payment of her pension and to pay the same over to her. It is further admitted by appellant that said Bent did make out for her an application for arrears of pension, and that she signed the same in his office. It further appears that the address given by the appellant to the Bureau of Pensions, both in said application and in her voucher sent to the pension agent for the amount of the aforesaid arrears of pension, was the post-office box of said Bent, and that the check of the pension agent for the amount of said arrears of pension was mailed by him to that address. It also appears from the indorsement upon said check that the signature of appellant is inscribed thereon in the same handwriting and witnessed in the same manner as a large number of the checks sent to her quarterly in payment of her pension; and there is no evidence, other than the unsupported statements of appellant, that she did not receive the proceeds of said check, or that the same were misappropriated by said C. E. Bent. Admitting, however, for the sake of the argument, that said Bent embezzled the amount of money paid upon said check, yet it does not appear that failure on the part of appellant to receive the same was due to any mistake or fault of the Government or of any of its officials. Said check was in payment of arrears of pension, regularly issued, and was mailed to the address given by the pensioner. The Goverment could do no more under the circumstances than it did do toward securing the payment to the proper person. The fact that said check fell into the hands of said Bent was due to his employment by the appellant as her agent for the transaction of her business; and he was enabled to perpetrate a fraud upon her, if one was committed, by reason of the knowledge of her business communicated to him by herself and

by reason also of her misplaced confidence in him. Had said check been lost or misappropriated before it reached the appellant, or the person designated by her to receive it, there would no doubt be reason to hold that the Government would be bound for its repayment; but, having been forwarded to the appellant in accordance with her own directions and received by her accredited agent, the liability of the Government in connection therewith ceased, and the Government can in no way be bound by the subsequent misappropriation of the money by said agent.

It appears that the said Bent and the witness Thompson are dead, and the other witnesses to appellant's signature could not be found by the special examiner who investigated this case, so that, if the indorsement of appellant's signature upon said check was a forgery, the parties to it are beyond the reach of process, either civil or criminal. If said money never, in fact, reached the hands of the appellant, the circumstances surrounding this case are truly unfortunate; but the Department is clearly of the opinion, for the reasons hereinbefore expressed, that neither the Bureau of Pensions nor the Department can afford the appellant any relief from her loss. Your action herein is consequently affirmed.

ERRONEOUS CERTIFICATION OF FEE.

MILO B. STEVENS & CO., ATTORNEYS.

Error on part of the Commissioner of Pensions in certifying fee to an attorney not entitled to certification shall not impair the rights of the lawful attorney in the claim, but the Commissioner shall correct said error by requiring the mistaken recipient of the fee to refund the same to the true attorney, who had been clearly recognized in the record, and who had filed the evidence upon which the claim itself was prosecuted to a favorable issue.

Assistant Secretary Hawkins to the Commissioner of Pensions, August 10, 1888.

Herewith are returned the papers which accompanied your report of July 14, 1888, upon the appeal of Milo B. Stevens & Co., attorneys, of Cleveland, Ohio, from your action requiring them to refund the sum of $25 certified and paid to them as fee on the restoration and increase issue of March 1, 1887, in the restoration pension claim, certificate No. 135,232, of James Paxton, late private, Third Battery Indiana Volunteers.

The claimant was originally pensioned August 22, 1865, and was dropped from the rolls June 26, 1878.

On Nov. 13, 1879, George E. Lemon, as attorney for claimants, filed a declaration for restoration, and, on March 31, 1880, he was informed that the application would not be considered for the reason that the disability alleged was contracted after claimant's discharge from the service.

On March 25, 1881, said Lemon filed additional evidence, but was informed, under date of March 29, 1881, that the evidence did not warrant further action.

On December 17, 1881, the appellants, as attorneys for claimant, filed a duplicate declaration for restoration, and under date of April 10, 1882, they were informed by you of the reason for dropping the claimant's name from the rolls, and that this action would not be reconsidered. On July 10, 1883, they asked for the status of the claim, and protested against being debarred from recognition as attorneys therein, stating that the claimant had failed to co-operate with them in its prosecution.

On March 22 and April 21, 1884, said Lemon filed evidence upon which the claim was re-opened and a special examination ordered. On August 16, 1884, he filed fee agreements with claimant, called up the claim at frequent intervals, and prosecuted it until it was adjudicated favorably.

In the meantime, on May 5, 1884, the appellant called for the status of the claim, and, on December 15, 1884, they also filed fee agreements with claimant; but beyond this they did nothing more in the claim, except to repeat their calls for its status, at intervals, until September 4, 1886, the date of their last call.

Certificate was issued March 1, 1887, restoring pensioner's name to the rolls, and upon said issue the appellants were recognized as attorneys, and the contract fee of $25 was certified and paid to them.

On May 4, 1888, the appellants were informed by your office that the certification and the payment of said fee to them was error, and they were requested to refund the same.

From said action they appealed, May 14, 1888.

At the date of filing the duplicate declaration for restoration by appellants, Mr. Lemon was clearly the recognized attorney of record in the claim, and the appellants should have been so informed by you. Your omission to do so was error, but it could not affect the rights of Mr. Lemon or serve to vacate his attorneyship, nor his right to recognition. He appears to have been recognized as attorney during the whole time the claim was pending, to have filed the evidence upon which it was re-opened, and to have duly prosecuted it to a favorable issue. The appellants, so far at least as is disclosed by the record and the files of the claim, performed no service for claimant which contributed to accomplish this result, and acquired no right to attorneyship in the claim under the duplicate declaration filed by them, by reason of your erroneous action in recognizing them and certifying to them a fee which properly belonged to another who had acquired a prior right to recognition, which was never abrogated, and who, in fact, performed the service which resulted in a favorable adjudication of the claim.

For the above reasons the Department is clearly of the opinion that the appellants are *not entitled* to retain said fee, and that it should be *refunded by them and paid* to said Lemon. Consequently, your action herein is affirmed.

SECOND APPEALS—NEW EVIDENCE.

SIMEON WHITE.

The Department re-affirms the doctrine that "only new evidence will entitle a case to consideration upon a second appeal—such evidence as would ordinarily entitle a party to a new trial or to a rehearing, under the well-known rules of practice in courts of law, except in cases of palpable error or mistake." [Ruch, Louis, vol. 1., P. D., p. 390.]

Assistant Secretary Hawkins to the Commissioner of Pensions, August 16, 1888.

Herewith are returned the papers which accompanied your report of August 9, 1888, upon the appeal of Simeon White, late private, of Company F, Eighty-sixth New York Volunteers, from your action refusing to re-open his claim for pension.

It appears from the papers on file in this case that the appellant enlisted September 26, 1861, and was discharged for disability (chronic diarrhea) November 23, 1862. He filed his claim for pension May 29, 1879, more than sixteen years after his discharge from the service, alleging disability from rheumatism, and lung disease resulting from camp fever contracted in the service at Camp Griffin, in the spring of 1862.

The claim was rejected on the 23d of October last, on the ground that there had been no disability resulting from rheumatism and lung disease, the sequence of camp fever, since discharge. The claimant appealed from this rejection and, on April 19, 1883, the Department, after a very thorough examination of the case, affirmed your action.

No motion for a reconsideration was filed with the Department, but it appears that subsequent thereto the appellant filed in your office additional testimony, with a view to showing incurrence of the alleged diseases of lungs and rheumatism in service, the existence of disability from that cause at discharge, and from that time up to date of filing such testimony.

After a careful consideration of the new testimony, along with claimant's record and the other evidence in the case, your office refused to re-open or admit his claim, on the ground that "there is no record of the alleged diseases nor of either of them in the service, and no satisfactory evidence of disability from alleged causes prior to 1871, and the testimony in the case shows beyond a question that his present disability results from syphilis, a disease which he admits he contracted in 1863, and he was so advised in substance."

The claimant, then, on July 14, 1888, filed an appeal from your said action refusing to re-open his claim.

This claim presents a state of facts that has often been passed upon and decided by the Department. Your original action of rejection has *been affirmed* by the Department on appeal, the claim fully and finally *adjudicated* on its merits adversely to the appellant, and is res adjudicata.

The testimony filed by appellant since the former appeal is merely cumulative upon the questions then considered, and falls within the decision of the Department in the case of Ruch, Louis (vol. 1, P. D., page 390), wherein it was held that—

The Department declines to consider evidence merely cumulative on a second appeal. Only newly discovered evidence will entitle a case to consideration upon a second appeal, such as would ordinarily entitle a party to a new trial or a rehearing under the well-known rules of practice in courts of law, except in cases of palpable error or mistake.

The Department declines to further discuss or to consider this claim upon its merits, and your action refusing to re-open the same is accordingly affirmed.

MAXIMUM FEE—SEPARATE CAUSES.

MAURICE LANGHORNE, ATTORNEY.

The Department holds that, when an attorney files a contract for fees, he is bound by it to prosecute the claim for all the causes that have been alleged as the basis for pension, and which are pending before the Bureau of Pensions; nor will the attorney be permitted to duplicate his fees in any claim by prosecuting separately the different pensionable causes that have been alleged in said claim.

Assistant Secretary Hawkins to the Commissioner of Pensions, August 10, 1888.

Herewith are returned the papers which accompanied your report of July 13, 1885, upon the appeal of Maurice Langhorne, attorney, of Washington City, D. C., from your action refusing to certify him a fee upon the issue of June 10, 1887, in the increase invalid pension claim, Certificate No. 13892, of Oliver Graffam, late private, Company I, Sixth Maine Volunteers.

In his original declaration, filed April 4, 1863, claimant alleged as the basis of his claim for pension diseases of liver and kidneys, diarrhea, rheumatism, and sun-stroke. His claim was allowed for disability resulting from diseases of liver and diarrhea, and rejected for remaining disabilities alleged, July 3, 1863.

On May 19, 1883, the appellant, as attorney for claimant, filed an application for increase, upon the basis of the pensioned disabilities, which was allowed February 14, 1885. Upon this issue, appellant was certified and paid a fee of $10.

Appellant continued to prosecute the claim on account of the remaining disabilities alleged, but not established; and, on February 20, 1885, he filed fee agreements with claimant.

On June 3, 1886, the claim for rheumatism was established and allowed, and claimant's rate of pension increased therefor to $10. Upon this issue appellant was paid the full amount of his contract fee of $25.

Continuing the prosecution of the claim for the alleged causes yet *remaining unestablished, on* June 10, 1887, the additional disabilities

(vertigo and impaired vision) were allowed as results of sun-stroke; and claimant's certificate was reissued to cover these causes. Upon this issue no fee was certified or paid to appellant for the reason that, upon the issue of June 3, 1886, the maximum legal fee of $25 had been paid for the services of the appellant in prosecuting the entire claim.

From said action he appealed June 28, 1888, contending that said reissue and the allowance of said additional disabilities were the result of his services in behalf of claimant, and that he was entitled to an additional fee.

In his original declaration the claimant had alleged and claimed pension for all the diseases for which he was afterwards pensioned, and granted increase of pension, so that at the time when appellant filed his contract for fee with claimant all these different causes had been asserted, pension claimed therefor, were waiting adjudication in your office, and constituted in the aggregate the claim of the soldier for pension.

The Department holds that, when an attorney files a contract with a claimant for fees, he is bound by said contract for the fee therein stated to prosecute the claim for all the causes that have been asserted and alleged as a basis for pension, and which are pending before the Bureau for adjudication; nor will the attorney be permitted to duplicate his fees in any one claim by prosecuting separately different pensionable causes that have already been alleged.

The appellant herein was paid the full amount of his contract fee upon the issue of June 3, 1886, nor was he entitled to any more upon the issue of June 10, 1887, he having been already paid the maximum fee that he was entitled to receive in any one claim.

For the foregoing reasons your action herein is affirmed.

RECORD OF ORIGIN—LAY TESTIMONY.

ALBERT WORTHLEY.

Where no record nor medical evidence appears to show the existence of the alleged disability in the service, and claimant fails to prove since discharge the pensionable degree of any disability due to the service, the claim should be rejected, lay testimony alone being insufficient to support claimant's declaration as to the alleged incurrence in the line of duty.

Assistant Secretary Hawkins to the Commissioner of Pensions, August 14, 1888.

I have considered the appeal of Albert Worthley, late sergeant, Company H, Twenty-third New Jersey Volunteers (Claim No. 401544) from your decision of January 19, 1884, rejecting his claim for invalid pension on the ground that "the records of the War Department failed to show that appellant suffered from alleged disease of kidneys in the

service; and his alleged inability to furnish medical testimony showing treatment in service or at discharge, for the same."

Claimant appealed from your decision February 5, 1884.

On June 6, 1884, your office informed the Department that the decision rejecting his claim had been reconsidered, and that the case would be placed in the hands of a special examiner to determine its merits and the value of testimony on file.

The case was specially examined by two special examiners, and every opportunity appears to have been afforded claimant to establish his claim. Both of said examiners recommended that the claim be rejected.

The record shows that soldier enlisted September 22, 1862; was discharged June 27, 1863; and filed his declaration for invalid pension June 20, 1880, alleging that he contracted kidney disease at Frederick City, Md., from exposure in October, 1862, resulting in great pain and weakness in the back and largely impairing his ability to engage in manual labor.

The records of the Adjutant-General's Office show claimant "reported on muster-roll to October 31, 1862; sent to general hospital, Frederick, Md., October 8, 1862. Similar report to February 28, 1863; to April 10, 1863 (special muster), absent. Detailed at distribution camp, Alexandria, Va., as commissary of subsistence sergeant since March 10, 1863. Similar report to April 30, 1863. Mustered out with company as private June 27, 1863, at Beverly, N. J. Cause of absence in hospital, October 8, 1862, not stated. Regimental hospital records not on file. The records of this office furnish no evidence of alleged disability."

The records of the Surgeon-General's Office show claimant "entered No. 1 General Hospital, Frederick, Md., October 8, 1862, with *debilitas*, and was returned to duty March 19, 1863.

"Records of Augur General Hospital, Alexandria, Va. (Camp Distribution), March 19, 1863, to June 27, 1863, and of the regiment, which cover October, 1862, to May 29, 1863, furnish no evidence in this case."

Claimant was specially examined before a single surgeon at Burlington, N. J., September 1, 1881, who reported as follows:

I am unable to discover any affection of the kidneys in this case. I am of the opinion that it is a case of lumbago or chronic rheumatism of the back. He is unable to work and has certainly a lame back. I believe it to be a case of rheumatism, the result of exposure. I would advise his pension to be fixed at one-fourth of total, or $2 a month.

Claimant was next examined by a board of surgeons at Trenton, May 16, 1883, who report as follows:

Tongue is coated; appetite is fair; has pains throughout the shoulders and legs, and feet swell, also face and hands; slight roughening of the sounds of the valves of the heart; heart is hypertrophied and rapid in action; impulse is diminished; has pain in the region of the kidneys; skin has a peculiar white, waxy look; no disease of lungs, or liver, or spleen; urine shows slight amount of albumen; the specific gravity, 1010. *One-half of total* for heart disease; one-fourth of total for disease of *the kidneys.*

Upon the coming in of the report of the special examiner, you again rejected the claim, February 6, 1885, on the ground of "no record or medical evidence of existence of the alleged disease in the service, appellant being unable to show disability at any time since discharge in a pensionable degree, by either of the diseases alleged, chargeable to the service."

The witnesses who testified before the special examiner were friendly to claimant. They testified that he was addicted to the excessive use of liquor prior to enlistment. There is an entire failure of testimony to show the incurrence of any disease resulting from his military service. There is a conflict in testimony as to claimant's physical condition subsequent to discharge. Eight witnesses testify that "nothing seemed to ail claimant at discharge nor for several years after."

This case comes within the ruling of the Department as announced in the case of Arad P. Brown (vol. 2, P. D., p. 88).

The rejection of the claim by your office was not error, and is therefore affirmed. The papers accompanying your letter of transmittal of August 7, 1888, are herewith returned.

CAUSE AND EFFECT—CIRCUMSTANTIAL EVIDENCE.

RUTH L., WIDOW OF FRANCIS O. MILLER.

1. Death-cause, to be pensionable, must be traced, whether immediately or remotely, to a wound or injury received or to a disease contracted in the line of duty, and this relation of cause and effect, established in accordance with the rules of probability, must exist in the sense that the alleged cause was the thing or the condition without which the result—*i. e.*, death—would not have occurred.
2. The Department re-affirms the ruling in the case of Robert G. Mosby, guardian, decided September 12, 1888, to the effect that "neither the law nor the rules of the Department require the fact of cause and effect to be proved beyond a reasonable doubt," inasmuch as that would exact "a degree of accuracy not warranted in a due enforcement of the law." Circumstantial evidence strong enough to produce a moral conviction is sufficient to establish the fact.

Assistant Secretary Hawkins to the Commissioner of Pensions, September 19, 1888.

I have considered the appeal of Ruth L., widow of Francis O. Miller, deceased, late first lieutenant Company D, Forty-sixth Illinois Volunteers (claim No. 342977), of August 18, 1888, from your decision of July 3, 1888, rejecting her claim for widow's pension, upon the ground that "the soldier's death by the fall of a building in 1880 was not due to his military service."

The two questions presented in this case for consideration are—

First: Was the alleged deafness of soldier incurred in the service and in line of duty?

Second: Was the death caused by, or did soldier die by reason of, said *deafness?*

Soldier enlisted February 27, 1864, was discharged January 20, 1866, and died October 16, 1880, being accidentally crushed by the falling wall of a building. He made no claim for pension during his life for deafness nor for any other disability.

You state, in your report to the Department in this case, that –

The appellant filed her application August 3, 1886, alleging that her husband, the soldier, received an injury to his ears, causing partial loss of hearing, and which was believed to be the real cause of the loss of his life, at Freeport, Ill., onthe 16th of October, 1880.

The claim was rejected July 3, 1888, on the ground that the soldier's death by the fall of a building in 1880 was not due to his military service.

From this action claimant appeals.

There is no record or other satisfactory evidence in the case showing that the soldier contracted deafness in the service; and he never applied for a pension.

It is held by the Department that casualties occurring as the indirect result of military service can not be accepted as the proper basis for pension. (See decision in the case of Elizabeth T. Pyle, P. D., vol. 1, p. 27.) This being a similar case, it is submitted that the action of rejection was proper and should not be disturbed.

An examination of the testimony in this case, to sustain incurrence of deafness, shows a lack of proof to establish the fact that soldier ever incurred deafness in the service and line of duty.

The affidavit of the regimental surgeon, dated December 15, 1886, is based entirely upon statements made by soldier.

There is no record nor medical evidence of treatment of soldier for deafness while in the service. While it is true that the legal presumption of prior soundness and the evidence of subsequent unsoundness point alike in the direction of the fact sought to be proved, yet they fall far short of proof sufficient to convince the ordinary mind that deafness was the result of soldier's military service in line of duty, and existed in a pensionable degree. Certain circumstances enter into the case which must be considered, as, for instance, the unexplained delay for fourteen years on part of the soldier to make any claim for pension, the entire lack of any hospital or medical record evidence of the incurrence of such a disability, and the lack of testimony on the part of his officers and comrades upon the subject.

The Department lays it down as a general rule, which appears to be applicable to this case, that in old cases lay testimony, when unsustained by the record and by medical evidence, is deemed insufficient to establish incurrence.

In the case of Henry W. Carpenter, decided by the Department September 11, 1888, it was held that "lay testimony, produced years after soldier's discharge, can not be accepted as proof of incurrence, when unsupported by either record or medical evidence." (See 2 P. D., p. —, citing Andrew J. McIntire, 1 P. D., p. 20; John W. Dodge, 1 P. D., p. 211; Franz Fallada, 1 P. D., p. 273; Arad P. Brown, 1 P. D., p. 88; Annie M. Waters, 2 P. D., p. —, and cases therein cited.

Even if the incurrence of deafness could be established, the immediate cause of death *is too remote* to entitle claimant to a pension. The ques-

tion as to whether the deceased would or would not have been crushed by the falling wall, if he had not been deaf, is a matter of mere conjecture. To entitle a widow to a pension, the death of her husband must have been the natural, probable, and proximate result of the disability contracted in the service and in line of duty.

In the case of Percilla Davis, decided by the Department June 28, 1886, her husband was pensioned for a gunshot wound of face, resulting in deafness of one ear. While engaged in mining cement-rock, he was injured by the falling of fire-clay, causing a compound fracture of his right knee, resulting in amputation May 10, 1879; and on the 21st of the same month he died. It was held, the result of death was too remote. (See 1 P. D., p. 104.)

It would hardly have been contended that had soldier's injuries from the falling wall resulted in a permanent disability, such as a broken arm or leg, instead of resulting as it did in death, the soldier would have been entitled to a pension or to an increase of pension for such injuries. So long as the law provides that the death, to entitle a widow to a pension, must be "by reason of wound or injury received, or of disease contracted while in the service of the United States and in the line of duty," the Department must adhere to the rule that the relation of causation, mediate or immediate, must exist between the "wound or injury received, or disease contracted," and death. The relation of cause and effect must exist in the sense that the *cause*, *i. e.*, wound, injury, or disease, received or contracted in the service, must be the *thing* or *condition* without which the *result*, *i. e.*, *death*, would not have occurred. It is not required that the relation of cause and effect be established beyond a reasonable doubt, but in accordance with the rules of probability, for it is upon the rules of probability, not absolute certainty of conviction, that the cause of death must be established. (See Burrill on Cir. Ev., pp. 23–80 and 81.)

As was said by the Department in the case of Robert G. Mosby, guardian, etc., decided September 12, 1888, neither the law nor the rules of the Department require the fact of cause of death to be proved beyond a reasonable doubt, for that would be to require a degree of accuracy not warranted in a due enforcement of the law. Neither is it necessary that the cause of death should be verified by direct and positive evidence. It is sufficient if it be proved by circumstantial evidence which produces moral conviction in the mind, equivalent to that which was the result of positive and direct evidence. (See Wills on Cir. Ev., p. 214.)

The question as to whether the cause of death was the remote or the immediate and proximate result of the "wound, injury, or disease" is governed by the rule alike applicable to accidental injuries in the service (see case of James Harding, decided by the Department August 31, 1888, (2 P. D., p. —) and cases there collated, and cases where the *question of* pathological sequences are involved. (See case of Mary

Farrar, decided by the Department August 29, 1888, and cases there cited, 2 P. D., p. 199.)

In the latter case pneumonia was rejected as being the result of chronic diarrhea.

The same rule, viz, that "in law the immediate and not the remote cause is regarded," obtains in cases where death is the result of suicide and accidental poisoning. (See case of Sarah A. Stack, 2 P. D., p. 153; Broom's Legal Maxims, p. 216.)

In the light of the foregoing principles, which are the rules of the Department applicable to this and to all similar cases, the Department sustains the rejection of the claim upon the ground that death is not "by reason of" the causes alleged.

Your action in this case is affirmed and the papers in the case accompanying your letter of transmittal of September 10, 1888, are herewith returned.

JURISDICTION OF COMMISSIONER LINE OF DUTY.

ZENAS HAMILTON.

1. When a claim for pension has been adjudicated upon appeal to the Secretary of the Interior, the Commissioner of Pensions can not on his own motion re-open, review, nor reverse the said adjudication, and, in doing so, his action will be held to be "a mistaken exercise of jurisdiction."
2. A decision of the Department upon an appeal in a pension claim must stand as the conclusive judgment in said claim, or else the supervisory control given by law to the Secretary of the Department of the Interior would become a nullity and the claimant's right of appeal from the Commissioner of Pensions would be merely nominal.
3. The Department re-affirms the rule in Ammerman, William (vol. 1, p. 5, P. D.), that "the cause of disability or of death giving title to pension must, in some manner, pertain to and have a natural and logical connection with the military service and to line of duty in said service."

Assistant Secretary Hawkins to the Commissioner of Pensions, September 15, 1888.

Herewith are returned the papers which accompanied your report of September 3, 1888, upon the appeal of Zenas Hamilton, late private, Company D, Twelfth Michigan Volunteers, from your action rejecting his claim for pension, No. 228,366.

Claimant enlisted September 14, 1864, and was discharged from the service June 17, 1865. He filed his original declaration for pension December 4, 1876, alleging as the basis of his claim that, "while in the service and in line of duty at Duvall's Bluff, Ark., on or about the 4th day of March, 1865, both the tibia and fibula of his left leg were fractured, the tibia being split to the ankle, producing an enlargement thereof and impairing the motion of the foot, and that the injured part has become the seat of neuralgia."

The claim was originally rejected February 28, 1883, upon the ground that claimant's injuries were not received in line of duty. Upon appeal from this adverse action to the Secretary of the Interior, said action was reversed by the then acting Secretary, March 5, 1885, and a departmental decision rendered instructing for a favorable adjudication of the claim. In pursuance of said departmental decision, the claim was briefed for admission March 21, 1885, for fracture of fibula of left leg, at $2 per month, from June 18, 1865.

It appears that the claim was subsequently personally considered by you and rejected March 31, 1885, upon the ground that "attending a circus as a spectator is not within the line of duty of a soldier." From said action of rejection, the claimant appealed June 20, 1888, contending that, the Department having passed upon the merits of the claim on appeal, having decided it in favor of the claimant and ordered its allowance, there was no authority of law for the action taken by you in the case, and that claimant's name should be placed on the pension roll in pursuance of the directions contained in said departmental decision reversing the former action of your Bureau.

OPINION.

With regard to the question raised by this appeal, as to the correctness and legality of your action rejecting this claim after the same had been favorably adjudicated by the Department, and in view of the state of facts upon which said departmental decision was rendered, I respectfully hold said action to be a mistaken exercise of jurisdiction.

While the Department is prepared to agree entirely with the correctness of your conclusions as to the merits of this claim, yet, it is convinced that your action in re-opening and reconsidering the departmental ruling in the case was error.

A departmental decision upon the claim, reversing the action of your Bureau, had been rendered, explicitly directing that the claim be favorably adjudicated, and all that remained to be done by you was either to obey said directions, or, if in your view said decision had been rendered upon a misapprehension of the facts, to call the attention of the Department thereto, and without delay request a reconsideration of the same. Such appears to have been the universal practice in all such cases, and is certainly the course that should be followed. It is unnecessary, in view of the numerous decisions of the Department upon the subject, with which you are familiar, to do more than state that a decision of the Department upon an appeal in a pension claim from the action of your Bureau must stand as the conclusive judgment in said claim, or else the supervisory control given by law to this Department over the Bureau of Pensions would become a nullity, and a claimant's right of appeal from your decisions would be merely nominal.

While the Department is of opinion that the aforesaid action of the Commissioner was erroneous for the reasons above stated, yet, as its attention has been fully called to the facts in the claim by this appeal and by your report thereon, it will not refuse to examine into its merits, with a view to ascertaining if error was committed by the former decision, and for the purpose of correcting the same in a proper manner. The attorneys of appellant do not in their appeal request a review of the facts disclosed by the evidence on file in the claim; they seem anxious to avoid it; but the Department feels called upon, in view of the extraordinary nature of said facts, to make such examination.

The undisputed facts connected with the incurrence of the injury, upon which the appellant bases his claim for pension, appear to be in substance as follows: Claimant's regiment was on duty as a provost guard at Duvall's Bluff, Ark., in April, 1865, and claimant, under command of a sergeant, was detailed with others as a guard to protect a circus performing at that place at the time. His post of duty was on the outside of the circus tent. He had been relieved from duty, and there was an interval of four hours before he resumed his post. During

ERRATUM.

On page 218, 2d vol. P. D., the first paragraph of the "Opinion," in the case of Zenas Hamilton, should read as follows, as it appears in the manuscript of the opinion itself, and as signed by Assistant Secretary Hawkins, viz:

"With regard to the question raised by the appeal herein, as to the correctness and legality of your action rejecting this claim upon your own motion, after the same had been favorably adjudicated, on appeal, by the Department, and upon the same state of facts upon which said departmental decision was rendered, the Department must unhesitatingly pronounce said action a mistaken exercise of jurisdiction."

EDITOR.

by the Department in the case

D., p. 5), that the "cause of disability or of death, giving title to pension, must in some manner pertain to and have a natural and logical connection with the military service, and to line of duty in said service;" and this decision has been followed as an invariable rule in all cases involving this question. (See cases on this subject in vol. 1, P. D.)

The soldier was unquestionably in the circus tent solely for his own comfort, convenience, and pleasure, and when the circumstances of the incurrence of his injury are viewed in the light of the foregoing well-established rule there can be no question that he was not in the line of duty at the time said injury was incurred, and is not entitled to pension therefor. This is so evident that the Department feels no hesitation in applying the rule enunciated in the case of Tyner, Noah N. (1 P. D., p. 21), wherein it is stated under what circumstances a departmental decision by a former administration will be overruled and set aside, and in which *it is held that* "where the incorrectness of the former action

The claim was originally rejected February 28, 1883, upon the ground that claimant's injuries were not received in line of duty. Upon appeal from this adverse action to the Secretary of the Interior, said action was reversed by the then acting Secretary, March 5, 1885, and a departmental decision rendered instructing for a favorable adjudication of the claim. In pursuance of said departmental decision, the claim was briefed for admission March 21, 1885, for fracture of fibula of left leg, at $2 per month, from June 18, 1865.

It appears that the claim was subsequently personally considered by you and rejected March 31, 1885, upon the ground that "attending a circus as a spectator is not within the line of duty of a soldier." From said action of rejection, the claimant appealed June 20, 1888, contending that, the Department having passed upon the merits of the claim on appeal, having decided it in favor of the claimant and ordered its allowance, there was no authority of law for the action taken by you in the case, and that claimant's name should be placed on the pension roll in pursuance of the directions contained in said departmental decision reversing the former action of your Bureau.

Bureau, had been rendered, explicitly directing that the claim be favorably adjudicated, and all that remained to be done by you was either to obey said directions, or, if in your view said decision had been rendered upon a misapprehension of the facts, to call the attention of the Department thereto, and without delay request a reconsideration of the same. Such appears to have been the universal practice in all such cases, and is certainly the course that should be followed. It is unnecessary, in view of the numerous decisions of the Department upon the subject, with which you are familiar, to do more than state that a decision of the Department upon an appeal in a pension claim from the action of your Bureau must stand as the conclusive judgment in said claim, or else the supervisory control given by law to this Department over the Bureau of Pensions would become a nullity, and a claimant's right of appeal from your decisions would be merely nominal.

While the Department is of opinion that the aforesaid action of the Commissioner was erroneous for the reasons above stated, yet, as its attention has been fully called to the facts in the claim by this appeal and by your report thereon, it will not refuse to examine into its merits, with a view to ascertaining if error was committed by the former decision, and for the purpose of correcting the same in a proper manner. The attorneys of appellant do not in their appeal request a review of the facts disclosed by the evidence on file in the claim; they seem anxious to avoid it; but the Department feels called upon, in view of the extraordinary nature of said facts, to make such examination.

The undisputed facts connected with the incurrence of the injury, upon which the appellant bases his claim for pension, appear to be in substance as follows: Claimant's regiment was on duty as a provost guard at Duvall's Bluff, Ark., in April, 1865, and claimant, under command of a sergeant, was detailed with others as a guard to protect a circus performing at that place at the time. His post of duty was on the outside of the circus tent. He had been relieved from duty, and there was an interval of four hours before he resumed his post. During this interval he went inside of the circus tent, as he says, "to keep warm and to see the circus." This was permitted by the sergeant in command of the guard and by the proprietors of the circus. The camp and guard-house were half a mile away, and instead of returning to camp to await the time when he should go on guard appellant, as was customary, remained at the circus to see the show. While seated in the audience within the circus tent, and during the performance, the seats gave way and fell on him, and he incurred thereby the injury to his leg which he alleges as the basis of his claim.

The mere statement of these facts is sufficient to show that the appellant could not be considered, by the most liberal construction, as in line of duty at the time of the incurrence of the alleged injury. It was held by the Department in the case of Ammerman, William M. (vol. 1, P. D., p. 5), that the "cause of disability or of death, giving title to pension, must in some manner pertain to and have a natural and logical connection with the military service, and to line of duty in said service;" and this decision has been followed as an invariable rule in all cases involving this question. (See cases on this subject in vol. 1, P. D.)

The soldier was unquestionably in the circus tent solely for his own comfort, convenience, and pleasure, and when the circumstances of the incurrence of his injury are viewed in the light of the foregoing well-established rule there can be no question that he was not in the line of duty at the time said injury was incurred, and is not entitled to pension therefor. This is so evident that the Department feels no hesitation in applying the rule enunciated in the case of Tyner, Noah N. (1 P. D., p. 21), wherein it is stated under what circumstances a departmental decision by a former administration will be overruled and set aside, and in which it is held that "where the incorrectness of the former action

is so manifest, upon a review of the evidence, that it is not a matter of dispute, the Department will not refuse to do justice because the error is of long standing and has been sanctioned by subsequent action."

For the above reasons said former departmental decision is hereby overruled and set aside, and the original action of the Bureau of Pensions rejecting said claim is affirmed.

COMMENCEMENT OF MEXICAN WAR.

THOMAS DALY.

The original date of the war with Mexico was not determined by a diplomatic quarrel but by an actual overt hostile act, inaugurating the conflict on the part of Mexico, April 24, 1846, to which reference was made by Congress in the preamble to the act of May 13, 1846.

Assistant Secretary Hawkins to the Commissioner of Pensions, September 18, 1888.

I have considered the appeal of Thomas Daly, Marine, United States Marine Corps (claim No. 19,527), of August 14, 1888, from your office decision of July 31, 1888, rejecting his claim for Mexican war service-pension upon the ground that claimant "did not serve in Mexico, on the coast or frontier thereof, or en route thereto, during the Mexican war, and that his service was rendered prior to said war." In your report to this Department, under date of September 8, 1888, you state:

Appellant filed a declaration, May 21, 1888, for the purpose of obtaining a pension under the act granting service-pensions to the surviving soldiers and sailors of the Mexican war. He alleges that he enlisted on or about March 24, 1842, served as a marine on the sloop-of-war, *Vincennes*, and was discharged at Norfolk, March 24, 1846. The records of the United States Marine Corps show that appelant was enlisted March 24, 1842, at New York, for four years, by Captain Macomber; transferred to U. S. S. *Fulton*, May 31, 1842; Brooklyn (N. Y.) Barracks, November 23, 1842; U. S. S. *Vincennes*, December 31, 1842; Norfolk (Va.) Barracks, August 31, 1844; U. S. S. *Pennsylvania*, August 17, 1844, and was honorably discharged, March 24, 1846, at Norfolk, Va., while attached to the *Pennsylvania*.

It was contended on the part of appellant in his appeal that the "war with Mexico began in March, 1845, at the time Almonte, the Mexican minister at Washington, demanded his passport, and announced that the joint resolution of Congress annexing Texas would be considered by his Government as a declaration of war on the part of the United States, and that the withdrawal of said minister on the part of Mexico was a breach of peace between the two countries; that war may exist without a declaration on either side or that the declaration may be unilateral."

It may be said in answer to the foregoing proposition that, in the case of war with Mexico at least, the question as to when the war commenced does not hinge upon a diplomatic quarrel, but is determined by an actual overt hostile act on the part of Mexico, April 24, 1846, culminating *in a skirmish* which resulted in the capture of Captain Thornton and

his party of dragoons, some sixty-three in number, and the killing of seven of his command. This was the act of the Republic of Mexico, referred to by Congress in the preamble to the act of May 13, 1846, which recites that, "Whereas by the act of the Republic of Mexico a state of war exists between that Government and the United States." (See Winthrop on Military Law, Vol. 1, pages 956–7; Bancroft's History of the Pacific States, Mexico, Vol. 8, pages 343–52; and the Opinion of Secretary Ewing, June 10, 1850, Mayo and Moulton, page 527.)

Your decision is affirmed and the papers in the case accompanying your letter of transmittal of September 7, 1888, are returned herewith.

CERTIFICATE OF DISABILITY—ADVERSE RECORD.

HENRY HALSTEAD.

The certificate of disability is the expert medical official registration of an existing fact, required by law to be recorded, made in compliance with law and in the line of duty; and the Department holds that such a certificate so far imports verity that it can not be overcome by the affidavit of the surgeon who signed it. A certificate of disability for discharge can be overcome by only the most positive and conlusive evidence of fraud or of mistake, apparent from the certificate itself.

Assistant Secretary Hawkins to the Commissioner of Pensions, September 6, 1888.

I have considered the appeal of Henry Halstead, late private Company H, One hundred and fiftieth New York Volunteers (invalid claim No. 551,460), taken July 30, 1888, from your decision of October 6, 1886, rejecting his application on the ground that "no disability had existed from causes alleged since date of filing his claim."

The only question involved in this case, as presented, relates to Inference; and, in determining that question, it becomes necessary to consider the force and effect to be given to an adverse medical record, in connection with the fact that claimant delayed for over twenty-four years to make an application for pension.

The records show that the soldier enlisted September 27, 1862. Discharged September 14, 1864. Filed declaration for pension October 8, 1885.

The following is a copy of soldier's discharge, and of the certificate of disability upon which said discharge was based:

ARMY OF THE UNITED STATES.

[Certificate of disability for discharge.]

Henry Halstead, of Capt. Platt M. Thorne's company (H), of the One hundred and fiftieth Regiment of New York Volunteers, was enlisted by E. Crummey, at Poughkeepsie, N. Y., on the 26th day of September, 1862, to serve three years; he was born at Pleasant Valley, in the State of New York, is thirty-seven years of age, 5 feet 8½ inches high, *brown complexion*, brown eyes, brown hair, and by occupation, when

enlisted, a merchant. During the last two months, said soldier has been unfit for duty. Has been unfit for duty since April, 1863. Complained of difficulty in passing his urine, and was irregular in its performance during the previous winter. Was sent to National Hotel Hospital, Baltimore, June 3, 1863, for treatment, and has not been with his company since that time.

WM. S. VAN KENREN,
First Lieutenant, Commanding Company.

Station: Normandy, Tenn. Date: January 18, 1864.

I certify that I have carefully examined the said Henry Halstead, of Capt. P. M. Thorne's company, and find him incapable of performing the duties of a soldier because of syphilitic disease, contracted prior to enlistment. He is wholly unfit for duty, or for the Invalid Corps, and has been in United States General Hospital from June 3, 1863, until December 13, 1862; is now in regimental hospital of One hundred and fiftieth New York Volunteers.

C. N. CAMPBELL,
Surgeon, One hundred and fiftieth New York Volunteers.

Discharged this 14th day of February, 1864, at Normandy, Tenn.

I. H. KETCHAM,
Colonel, Commanding the Regiment.

With full knowledge of this adverse medical record against him, the claimant makes no effort to correct the same, but, after a lapse of nearly twenty-five years, files his declaration for pension, in which he alleges that—

While a member of the organization aforesaid, in the service and in the line of his duty, at Camp Mellington, in the State of Maryland, on or about the month of October, 1862, he was exposed to wet and cold under a shelter tent, and contracted rheumatism and neuralgia of the muscles and limbs, which has entirely disabled him from performing any manual labor, and from which he has suffered continually since his discharge from the Army. That he was treated in hospitals as follows: National Hotel Hospital, Baltimore, Md., having been sent there for discharge, from June to December, 1863. * * * That he is now totally disabled from obtaining his subsistence by manual labor by reason of his injuries, above described, received in the service of the United States.

The records in the Adjutant-General's Office show that the claimant was enrolled on the 27th day of September, 1862, at Poughkeepsie, N. Y., and is reported: On roll for September and October, 1862, present. Sick in quarters, November 1, 1862, to April 30, 1863, present. May 1 to August 31, 1863, absent sick at Camden street National Hospital, Baltimore, Md., since May 12, 1863. September and October, 1863, absent sick in General Hospital, Baltimore, Md., since May 12, 1863. November and December, 1863, present. January and February, 1864; discharged for disability February, 1864.

Certificate of disability reports him discharged at Normandy, Tenn., February 14, 1864.

The application for position as superintendent of national cemetery, Yorktown, Va., is filed in the office of the Quartermaster-General, U. S. Army.

Regimental Hospital records furnish no information. The records of *this office furnish* no evidence of alleged disabilities.

The records of the Surgeon-General's Office show that—

Henry Halstead, private Company H, One hundred and fiftieth New York Volunteers., entered General Hospital, Camden street (located in the National Hotel), Baltimore, Md., June 3, 1863, with rheumatism and was furloughed, October 30, 1863; readmitted, November 3, 1863, and returned to duty November 30, 1863; and that he was discharged from service February 15, 1864, at regimental hospital. Cause of discharge not stated.

It appears from the foregoing quotations from official certifications that claimant is confronted by an adverse medical record, which, according to the well-established rules of the Department applicable to certificates of disability for discharge, can be overcome only by evidence of fraud or of mistake apparent from the certificate itself, or clearly established by such positive and conclusive evidence as will carry conviction to the mind. (Isaac Williamson, 1 P. D., p. 7; William H. Stone, *ibid.*, 182; Anson Howe, *ibid.*, 193; Thomas McCreary, *ibid.*, 275; Joseph D. Sawyer, 2 P. D., 122; Arad P. Brown, *ibid.*, 88.)

Claimant seeks to overcome the force and effect of the surgeon's certificate of disability in the case by showing that the surgeon erroneously substituted the word "syphilis" for the word "rheumatism" when filling out his certificate. Thereupon, he is confronted with his regimental surgeon, Cornelius W. Campbell, who filled out the said certificate and who testified as follows before the special examiner at Poughkeepsie, N. Y., August 13, 1887:

My occupation is physician and surgeon, and am a member of the board of examining surgeons here; was surgeon of the One hundred and fiftieth Regiment New York Volunteers from its organization to its muster-out, and know this claimant as a member of said regiment and before his enlistment.

Q. Have you heard the depositions of Stephen G. Cook, taken July 14 and 21, page 21 to 35, read?—A. Yes, sir.

Q. What reply have you to make to the charge made therein that you substituted the word "syphilis" in this claimant's certificate of discharge for "rheumatism," and that claimant never had syphilis then, as you certified then and since?—A. I have simply to say that I examined the claimant when I made the certificate, and that the claimant had, as recorded, syphilis and rheumatism, and Dr. Clark did not examine him, the claimant. When I made the examination Cook was not present.

Q. Did you make any such statement to Cook as he ascribes to you, as to the substitution of syphilis for rheumatism, in order to procure the discharge, because the rheumatism was not of sufficient magnitude to warrant a discharge?—A. I did not. The case is as the record shows it, and I have no changes to make in my statements. They are true, as the record shows, and that is all I have to say. I will say that the part of Dr. Cook's statement as to the manner of this claimant's going into the service under the said provision is almost correct, as I remember the agreement, of which I was well advised at the time, that such was the arrangement that he was not to do duty, and I think never did.

Q. Did that agreement influence you in any way to substitute the disease of syphilis when claimant did not have it, that you might discharge him?—A. It did not; he was at the time unfit for service by reason of the combined diseases of syphilis and rheumatism, and I discharged him on the ground stated. His health, so far as I knew, was good at enlistment. I have understood all questions, and my answers are correctly recorded herein.

It appears from the report of the special examiner that the claimant, although present and expressing himself satisfied with said examina-

tion and with the manner in which it had been conducted, declined or neglected to cross-examine the witness whose testimony was so adverse to him. This would be sufficient to estop him from now attacking the official record, if it were necessary to invoke the doctrine of estoppel. It is not apparent how he would be materially aided in his claim for pension upon the ground of rheumatism and neuralgia resulting therefrom, even if it be conceded that the mistake was made as alleged. The fact would still remain that the record asserted the fact that the disease was contracted prior to enlistment.

The certificate of disability is the expert medical official registration of an existing fact, required by law to be recorded, made in compliance with law and in the line of duty. (Par. 245, 246, and 247, U. S. Army Regulations (1881), p. 30–31; 1 Greenleaf on Evidence, par. 493.)

The Department has held that such certificates so far import verity that they can not be overcome by the affidavit of the surgeon who signed the certificate. (James Boyle, 1 P. D., p. 149; Isaac Williamson, *ibid.*, p 7.)

In the case of Benjamin Tutt (1 P. D., p. 412) the Department recognized the rule that the certificate might be overcome by proof showing "mistake." In this case, however, no fraud or mistake is shown, and the certificate of disability must be held to control. It also appears that the opinion of the medical referee is that claimant's present condition is, in all probability, a result of the disability for which claimant was discharged.

In medical questions, the Department is generally governed by the opinion of the medical referee. (William H. Garrison, 1 P. D., p. 262; Uriah W. Romine, *ibid.*, 299; William Scott, 2 P. D., p. 43.)

In view of the foregoing conditions, your action rejecting the claim is affirmed, and the papers accompanying your letter of transmittal of August 31, 1888, are herewith returned.

ACT OF AUGUST 4, 1886.

CHARLES A. BECKERT.

The act of August 4, 1886, makes no provision for equivalent disabilities, but provides pension for only total disability of a hand, of a foot, of an arm, or of a leg, and such specific disability must be shown in order to entitle claimant to the benefits of the act.

Assistant Secretary Hawkins to the Commissioner of Pensions, September 15, 1888.

I have considered the appeal of Charles A. Beckert, late captain Company K, One hundred and tenth United States Colored Troops (certificate No. 97059), of August 6, 1888, from your decision of June 5, 1888, *rejecting his application* for increase from $24 to $30 per month, based upon the opinion of the medical referee.

Claimant was granted a pension at $24 per month under act of March 3, 1883, for a gunshot wound of left thigh based upon the following opinion of the medical referee, January 22, 1884, viz:

Approved for gunshot wound left thigh resulting in total disability, such as to render incapacity to perform manual labor equivalent to the loss of a hand or a foot, third grade from November 19, 1883.

On the date last aforesaid claimant was examined at Decatur, Ala., by an examining surgeon, who reported as follows:

The examination reveals the following facts:

That this applicant has the scars of a gunshot wound of left thigh; ball entered on the outside, a little below midway, and came out 2½ or 3 inches higher on the inside of said thigh, severing the femoral nerve, which disables him to perform manual labor necessary to a support.

This applicant has had to abandon his profession as a printer—not able to stand on his left leg. His left foot is nearly always cold, from the femoral nerve having been cut. The muscles were very much injured by the passage of the ball; his left leg is of but very little use to him. He is not able to do any manual labor. His left leg appears almost in a deadened condition. He is very feeble, induced, he says, by wound of said left thigh, confining him at times to his bed. He is a man of temperate habits. I find his disability, as described above, to be equal to and entitling him to an increase from $15 to $25 per month.

Claimant, having made an application for increase, bases his claim upon the allegation of a new and different disability, viz, "rheumatism in right arm and shoulder, contracted from exposure in October, 1864." Admitting this claim as established to the fullest extent alleged by claimant, it would be entirely immaterial as a reason for increasing his rating to $30 or to $36 under the act of August 4, 1886. That act grants pensions at $30 only for loss of hand or of foot, or total disability of hand or of foot, and for $36 per month for loss of arm at or above the elbow, or for loss of leg at or above the knee, or for a total disability of arm or of leg. The act makes no provision for equivalent disabilities nor any pension for rheumatism, unless such disability or rheumatism results in a total disability of hand, foot, arm, or leg. (See Act of August 4, 1886, 1 P. D., appendix, p. 68.)

While claimant does allege in his application for increase that his disability resulting from the wound in his thigh is continually on the increase, he does not contend or claim that the rheumatism totally disables either his hand, foot, arm, or leg. He has evidently misconceived his rights under the provisions of the act of August 4, 1886.

The present medical referee evidently realized the immateriality of proof of rheumatism in this case, as in his opinion under date of June 24, 1887, he says:

This claimant is now on the rolls at third grade, and claims rheumatism as a new disability. There is nothing in the case to warrant the opinion that, should rheumatism be proved, any increase of rate could be allowed; and, as the board of surgeons at Chattanooga says positively there are no evidences of same, it would seem unnecessary to submit claimant to any more expense until there is some chance that he may be benefited thereby.

The question was considered by the Department June 15, 1888, in the *case of Joseph Becher*, vol. 2, P. D., p. 109, and the acts of March

3, 1883, and of August 4, 1886, construed. (See also the case of John R. Weddle, *ibid.*, p. 97; John Adams, *ibid.*, p. 63; and Charles W. Struble, *ibid.*, p. 14.)

The only question in the case for decision on this appeal is whether claimant is entitled to an *increase* of rating by virtue of the act of August 4, 1886. This question the Department decides in the negative, for the reason that the evidence does not show that claimant is "totally disabled" in either his "foot" or his "leg."

Therefore your decision is affirmed, and the papers in the case, accompanying your letter of transmittal of September 5, 1888, are herewith returned.

INCREASE OF PENSION—ATTORNEY'S FEE.

MILO B. STEVENS & CO., ATTORNEYS.

Where a soldier's pension is increased by operation of law, the increase being granted upon the evidence already filed with the original application, no attorney's fee will be allowed, inasmuch as "the attorneys rendered no service which was necessary to the allowance of the claim." (See acts June 8, 1872, June 18, 1874, August 4, 1886.)

Assistant Secretary Hawkins to the Commissioner of Pensions, September 8, 1888.

Herewith is a letter of Milo B. Stevens & Co., of Washington City, in which they ask the Department to reconsider the decision of May 28, 1888, affirming the action of your office in refusing to allow them a fee upon the allowance of *increase* of pension to John Way, certificate No. 91247.

The said John Way is a pensioner on account of resection of the right shoulder. In October, 1886, he filed an application for increase of pension from $24 per month. On November 10, 1886, a certificate was issued increasing the pension to $36 per month under the act of August 4, 1886. The appellants were not required to furnish any evidence. No medical examination was ordered under the application for increase. The pension was increased upon evidence on file in the case at the time the application for increase was made. The action denying a fee was based upon the fact that the attorneys rendered no service which was necessary to the allowance of the claim.

The decision in this case is consistent with long established precedents. On the 13th of July, 1872, the Secretary of the Interior considered the question of the right of an attorney to a fee upon the allowance of an increase of a soldier's pension from $15 to $18 per month under the act of June 8, 1872. In his decision the Secretary states that he was clearly of the opinion that applications for increase of pension under the act of June 8, 1872, should not be considered as claims in the

sense contemplated by the law, and that, therefore, no fee for preparing and forwarding such an application could be allowed.

On the 20th of November, 1875, the Secretary considered the claim of an attorney to a fee in a case in which increase of pension was allowed under the act of June 18, 1874, in which the disability, loss of leg above the knee, was fully established by evidence previously existing in the case; and he held that no fee was due to the attorney, for the reason that no services on his part were necessary to the allowance of the increase.

These decisions are in accordance with the present views of the Department. No authority is found for the payment of a fee to an attorney in a pension claim, except for necessary services rendered in the prosecution of it.

The former decision in this case is adhered to.

INCURRENCE AND DEATH-CAUSE.

ANNIE M., WIDOW OF HENRY H. WATERS.

Where the evidence to establish the incurrence of an alleged disability in the service is not only unsatisfactory in itself, but unsupported by either record or medical evidence, such as required by the rules of the Department, it can not be accepted as sufficient to prove the incurrence as alleged. Lay testimony, lacking the quality of personal knowledge, and given years subsequent to soldier's discharge, must be corroborated by a record made contemporaneously with the origin of the alleged disability in the line of duty.

Assistant Secretary Hawkins to the Commissioner of Pensions, August 28, 1888.

I have considered the appeal of Mrs. Annie M. Waters, widow of Henry H., late first lieutenant Company B, Thirty-seventh Regiment New Jersey Volunteers (claims Nos. 531,303 and 335,714), from your decision dated August 19, 1887, and January 20, 1888, rejecting the invalid claim upon the ground of "no record of the alleged disability and no positive evidence of the origin of diarrhea in the service nor its existence at discharge," and rejecting the widow's claim on the ground that "soldier's fatal disease (cerebral hemorrhage) was not due to any disability contracted while in the service."

Soldier was mustered into the service as first lieutenant Company B, Thirty-seventh New Jersey Volunteers, June 24, 1864; served one hundred days, and was mustered out October 1, 1864, with his company.

Soldier was married to claimant August 12, 1875. Having become insane, claimant filed declaration for invalid pension as guardian January 31, 1885, alleging that soldier, while at Port Walthal Junction, Va., about August, 1864, was prostrated by malignant dysentery, brought on by being exposed to a severe rain-storm, without either shelter or food, and to subsequent hardships. Soldier died September

16, 1885, and claimant filed her application for widow's pension July 24, 1886, in which she alleges that "on or about the 15th of July, 1864, soldier became prostrated with malignant dysentery, which afterwards became chronic, resisting all treatment to subdue, and through which disability he became insane and blind, dying from *cerebral hemorrhage* on the 15th day of September, 1885."

The records of the Adjutant General's office show that soldier "served one hundred days and was mustered out October 1, 1864, date of muster out of company. There are no current muster-rolls of company, or returns, or organization books, including general hospital records, on file. The New Jersey Militia Regiment (Pennsylvania emergency of 1863) is a State organization, and therefore the records are not on file in this office. Attention is invited to report of August 13, 1885, from Surgeon-General's Office, herewith."

The report of the Surgeon-General's Office of August 13, 1885, above referred to, shows that "the name of the soldier in question does not appear on the following-named records on file in this office, 'Ward General Hospital, (known as Center-street Hospital) to June, 1862; Newark, N. J., August 1, to September 19, 1864. Medical records of Thirty-seventh New Jersey Volunteers not on file in this office."

The testimony in this case, which is very voluminous, has been carefully considered, and it establishes, in my opinion, the following facts: First, that the soldier was in good health and free from disease at the date of entering the service; second, that he complained from diarrhea while in the service, and was relieved from duty by reason of said alleged disability, the colonel of the regiment, the first lieutenant of Company C, and several comrades testifying to his having diarrhea while in the service, basing their knowledge of the fact upon the soldier's personal appearance and his statements made at the time; third, that upon his return from the service he was not a well man; that he was suffering from diarrhea, for which he received medical treatment; that his disease appears to have become chronic; that his health grew worse from year to year; that his sight became impaired, resulting in total blindness of the left eye in 1880; that he became insane, and a decree of lunacy was granted claimant on her application therefor October 18, 1884, alleging insanity two years and nine months prior thereto.

The only material question involved in this appeal is, did claimant contract his disability (diarrhea) while in the service and line of duty? The question of pathological sequence and cause of death is determined by the opinion of the medical referee March 17, 1886, as follows:

Approved for dysentery and resulting disease of brain, *i. e.*, insanity, and total blindness, total to March 1, 1878, $50 to June 17, 1878, and $72 per month thereafter.

The case had been previously approved by the legal reviewer, March 9, 1886, "for dysentery and results," which action was again approved as per original indorsement, as amended by the medical referee and the chief of the board of rereview, January 7, 1887.

I have carefully examined all the evidence bearing upon incurrence, nd am convinced that it fails to satisfactorily establish the fact within he rules of this Department. The testimony is weak, uncertain, and conflicting, and rests upon the appearance and statements of the officer, and not upon personal knowledge of the fact. If the facts are as alleged by claimant, then we have presented the case of the Government offering soldier $17 per month for over thirteen years, or until March 1, 1878, when the offer is increased to $50 per month until June 17, 1878, when it is raised to $72 per month, during all which time the offer is rejected, the soldier making no claim. Not only this, but on November 5, 1877, we find soldier making an application for life insurance in which he alleges good health and states in effect that he has never been afflicted with diarrhea or dysentery. He passes a medical examination by the physician for the insurance company, who pronounces him a good risk, and soldier secures his policies. Neither claimant nor her medical witness, Dr. Kipp, fixes soldier's insanity earlier than the first part of 1878. There is neither record evidence nor any medical evidence of soldier's illness from diarrhea or dysentery, nor from any other disease, wound, or injury while in the service. This case comes within the rules of the Department announced in the case of Arad P. Brown, decided by the Department April 9, 1888. (See P. D., vol. 2, p. 88.) In that case the Department said:

> The appellant endeavors to establish the origin and existence in the service of the alleged rheumatism, by the vague and uncertain testimony of comrades alone, given many years afterwards. The records of the War Department furnish no evidence either corroborating the testimony of said comrades or showing the existence of the alleged disease in the service; and appellant admits his inability to produce any medical testimony showing treatment therefor during his service. Such testimony, unsupported by the record or by medical evidence, is, as the Department has decided in a number of cases, not sufficent to establish origin in the service.
>
> In the case of McIntire (1 P. D., p. 20) it was held: "Lay testimony, when unsupported by the record or by direct medical evidence, and which is dated years after claimant's discharge, can not be accepted as proof of the incurrence of the alleged disability in the service."
>
> See also to the same effect the cases of Dodge, John W. (1 P. D., p. 211), and Fallada, Franz (*id.*, p. 273). See also cases of William Waterbury (2 P. D., p. 53); Levi Connor (2 P. D., p. 1); Samuel Fisher (1 P. D., p. 297); William P. Innis (1 P. D., p. 19); Jacob S. Stewart (1 P. D., p. 340).

Not only is the proof of incurrence not established, but I am strongly impressed with the conviction that the claim is absolutely without merit and was properly rejected. Your decision is therefore affirmed and the papers accompanying your letter of transmittal, dated August 13, 1888, are herewith returned.

LAY TESTIMONY—HOSPITAL RECORD CERTIFICATE OF DISABILITY.

HENRY W. CARPENTER.

1. The Department reaffirms the ruling in the cases of Andrew J. McIntire, John W. Dodge, Franz Fallady, Arad P. Brown (vol. 1, P. D.), and Annie M. Waters (vol. 2, P. D.) to the effect that lay testimony which is produced years after soldier's discharge can not be accepted as proof of incurrence of the alleged disability, when unsupported by either record or medical evidence.
2. It is presumed that the hospital record and the certificate of disability state all the material facts relating to the alleged disease or wounds or other disability.
3. The Department adheres to the rule in Wm. M. Bradshaw (vol. 1, p. 239, P. D.), wherein it was held that "when an officer applies for and receives a certificate of disability to accompany his resignation, and forwards the same with his letter of resignation, his act of transmitting the certificate to his commanding officer raises the presumption that the facts therein stated are by him admitted to be correct and, having availed himself of the benefits derived from the statements contained in the certificate, he is estopped from denying their correctness, many years afterwards, except upon testimony of the most positive and conclusive character."

Assistant Secretary Hawkins to the Commissioner of Pensions, September 11, 1888.

I have considered the appeal of Henry W. Carpenter, late assistant surgeon, One hundred and seventeenth New York Volunteers (certificate No. 65260), of July 27, 1888, from your decision of November 16 1887, rejecting so much of his claim as was based upon hernia of right side and injury to the left shoulder, upon the ground that there is no record of these disabilities, and appellant had stated his inability to furnish the necessary evidence to prove the incurrence of them in the service and line of duty. You report that—

Appellant was pensioned June 7, 1866, at $4.25 per month, from November 6, 1864, the date of his discharge, for disability from chronic diarrhea and fever. He was dropped from the rolls February 5, 1870, on the ground that medical examination showed that the disability had ceased. April 18, 1881, he was restored to the rolls at $4 per month from the date of dropping, and $8.50 from June 25, 1879, for disability from chronic diarrhea, typhoid fever, and resulting disease of heart, and to $12.75 from August 13, 1884, for increased disability from the pensioned cause.

In a declaration filed April 11, 1887, the appellant alleged that, while in the line of duty returning to camp from Suffolk, Va., about April 27, 1863, he received an injury by being thrown from his horse, causing hernia of the right side and injury of the left shoulder; also, that the fever was contracted while assistant surgeon and the chronic diarrhea while surgeon; and he claimed an increase on account of the alleged hernia and injury to shoulder, and a reissue to correct rating from discharge.

November 16, 1887, upon an adjudication of this claim, appellant was allowed a reissue to correct and increase his rating to $5.25 from discharge to $10.50 from June 25, 1879, and to $14.75 from August 13, 1884. At the same time so much of his claim as was based on the new disabilities, "hernia of the right side and injury to the left shoulder," was rejected on the ground that there is no record of those disabilities, and appellant had stated his inability to furnish the necessary evidence to prove their incurrence in the service and line of duty. He appeals from the rejection of the new disabilities, and contends that their incurrence in the service and line of duty is *fairly established* by the testimony filed in the case.

The Adjutant-General's report shows that appellant was enrolled as assistant surgeon of the One hundred and seventeenth Regiment, New York Volunteers, August 15, 1862, and discharged May 1, 1863, and was on the same day mustered in as surgeon of the same regiment. The return for October, 1864, reports him absent, sick. Having tendered his resignation, he was honorably discharged the service, November 5, 1864. Appellant's resignation was based upon a certificate of disability in which N. Y. Leet, Surgeon Seventy-sixth Pennsylvania Volunteers, certified that he had "carefully examined this officer and find that he is suffering from chronic diarrhea complicated with malarial fever and rheumatism. He contracted the diarrhea on Folly Island, S. C. He had been unfit for duty the greater part of the time for the past three months. In my opinion he is unfit to remain in the service and in order to restore him to health and prevent him from permanent disability, I believe he should be discharged."

The records furnish no evidence of the alleged injury or hernia. An examination of the records and files discloses no testimony from any witness who saw the alleged accident, and appellant says the accident occurred in the night when the only person besides himself present was the soldier on guard at the place, and that such soldier was a stranger to the surgeon, and his post-office address is unknown to him.

In an affidavit filed April 1, 1887, Lieut. H. L. Adams, testifies from a private memorandum that he remembers well of learning from the surgeon that he (the surgeon) was seriously injured by being thrown from his horse. The entry in affiant's book, dated April 29, 1863, stated: "Dr. Carpenter *told me* this morning that his saddle turned with him while remounting his horse while coming to camp from Suffolk, where he had been after medicine for the regiment; that he had hurt his shoulder and breached himself badly. And there he was, pale and sick, on duty." * * *

In an affidavit filed April 1, 1887, H. N. Marchisi, late hospital steward of appellant's regiment, testified that appellant received an injury to his left shoulder, and hernia of the right side, at Suffolk, Va., about April 27, 1863, by the saddle upon which he was riding turning with him. Affiant knew those facts on the same day he was injured. Affiant examined him and found a hernia hard to reduce, and that his shoulder was bruised, and that *the doctor told affiant* at the time that he was injured while coming from Suffolk to camp with some medicines. Affiant saw the hernia frequently while in service and after dicharge sold the doctor a truss.

After a careful review of this case it is submitted that the surgeon's certificate upon which appellant was discharged from service should be accepted as at least presumptively correct, and as stating all the disabilities which he then had, and that, in the absence of any record evidence, the testimony filed by appellant is not sufficient to overcome the statements of that certificate or to prove the incurrence of the alleged injury to shoulder, and hernia, or either of them, in the service and line of duty, or the existence of any disability from the alleged causes at discharge. This conclusion is strengthened by the circumstances that appellant made no mention of the alleged injuries in his original declaration, or in his claims for restoration. He first mentioned the alleged hernia and injury to shoulder in an affidavit filed November 12, 1880.

The Department uniformly holds in cases of this nature—

(1) That lay testimony which is produced years after soldier's discharge can not be accepted as proof of incurrence when unsupported by either record or medical evidence. (Andrew J. McIntire, 1 P. D., p. 29; John W. Dodge, 1 P. D., p. 211; Franz Fallada, 1 P. D., p. 273; Arad P. Brown, 2 P. D., p. 88; Annie M. Waters, decided by the Department August 28, 1888, p. 227, and cases therein cited.)

(2) That it is presumed that the hospital record and certificate of disability state the facts, and all the material facts, as to disease or wounds

other disability. (William M. Hardy, 1 P. D., p. 261; Henry Hailstead, 2 P. D., p. ——, decided by the Department September 6, 1888.)

In the case of William S. Bradshaw (1 P. D., p. 239) the Department holds that—

When an officer applies for and receives a certificate of disability to accompany his resignation and forwards the same with his letter of resignation, his act of transmitting the certificate to his commanding officer raises the presumption that the facts therein stated are by him admitted to be correct; and, having availed himself of the benefits derived from the statements contained in the certificate, he is estopped from denying their correctness many years afterwards, except upon testimony of the most positive and conclusive character. The testimony filed in this case is not sufficient to overcome the adverse record of the surgeon's certificate of disability; and your action in rejecting the claim is therefore affirmed and the appeal dismissed.

The foregoing quotation is applicable to this case. With a full knowledge of his medical record, the claimant makes no effort to correct the same, but after a lapse of sixteen years he for the first time alleges, as a cause of disabilities, injuries of which there is neither record nor medical evidence, and which under the foregoing rules of the Department he fails to establish.

Your decision is therefore affirmed, and the papers in the case accompanying your letter of transmittal of August 31 are herewith returned.

INJURIES—LINE OF DUTY.

JAMES HARDING.

Injuries alleged by claimant must sustain a natural and logical relation to the military service in order to be properly ascribed to the line of duty, and the question of personal responsibility or guiltiness for the incurrence of said injuries does not enter into such a claim for pension.

Assistant Secretary Hawkins to the Commissioner of Pensions, August 31, 1888.

I have considered the appeal of James Harding, private, Company B, First Michigan Light Artillery (claim No. 618361), of July 25, 1888, from your decision of May 11, 1888, on the ground that "the alleged wounds of head and shoulders were not incurred in line of duty."

The only question involved in this appeal relates to "line of duty."

Claimant's appeal, which is a concise and fair statement of his case, alleges that his disabilities "consist of partial paralysis of his brain from the effects of a saber cut or blow received as hereinafter set forth, viz: That on or about the 18th of February, 1862, while on boat en route from Saint Louis, Mo., to Fort Donelson the boat landed at Cairo, and while there and asleep in his bunk on board said boat he was mistaken by a comrade for another person and was struck on his shoulder and head, producing partial paralysis of his brain from which he has never recovered." * * * "Claimant appeals for a reconsideration of his

said claim for the reason that he was wounded while in line of duty and without any fault on his part; that the wounding was as much a reality to him as though it had been received amidst the clash of arms and smoke of battle, and he can see no reason why he is not entitled to receive the same consideration."

The records of the War Department show that appellant enlisted November 13, 1861, and reported "present" to February 28, 1862. Absent sick in hospital, Cairo, since March 22, 1862. Not borne on rolls to October 31, 1862. November and December, 1862, he is reported "deserted" at Cairo, Ill., since March 22, 1862. Charge of desertion of March 22, 1862, removed, he having been admitted to hospital at Cairo, Ill., on that date, and discharged April 3, 1862, on account of "hernia." No further evidence of disability on Adjutant-General's records. The Surgeon-General's records show the appellant treated in Depot General Hospital, Cairo, Ill., March 16 and March 20, 1862, for "catarrhus," and from March 22 to April 3, 1862, for "hernia and dysentery," and discharged from service, April 3, 1862. No record of any treatment other than above.

Was claimant disabled by reason of any wound or injury received while in the service of the United States and in the line of duty? Is there any relation, mediate or immediate, between soldier's military duty and wounds received at the hands of a comrade who mistook claimant for another soldier upon whom he sought to inflict punishment for some real or imaginary grievance?

The Department holds in this and all similar cases that the wound, injury, or disease must be the natural, probable, or proximate result, either mediate or immediate, of soldier's military duty, and that the phrase "line of duty" denotes that an act of duty performed in order to entitle claimant to a pension must have relation of causation, mediate or immediate, to the wound or injury received or the disease contracted, and which produced the said disability or death.

It can not be reasonably claimed that the assault upon the claimant by his comrade, the result of mistaken identity, was the logical incident or probable effect of duty performed in the service. The question is not whether the soldier was in line of duty at the time he received his injury, in the sense that he was not disobeying any military law, rule, or regulation, or guilty of any culpable negligence, but rather what is the quality or condition of the act which produced the injury of which complaint is made? Claimant was not wounded or disabled because he was a soldier. Neither was the injury the result of any military duty, or, in the language of the statute, "by reason of" his military duty.

This question was discussed and decided by this Department in the case of William M. Ammerman, June 25, 1886. In that case, the claimant was the victim of a practical joke on the part of his comrades, resulting in an injury of the left clavicle and acromion process. He was in no way responsible for his injury. His claim for pension was rejected

upon the ground that "cause of disability or death giving title to pension must in some manner pertain to and have a natural and logical connection with the military service and line of duty in said service." (Vol 1 P. D., p. 5.)

In the case of William Jones (1 P. D., p. 78) claimant who was leaning upon a banister, was pushed over and injured by two comrades who were engaged in scuffling. He was injured and disabled as the result of said scuffle. *Held*, that the testimony failed to prove that the injury received by claimant was the result of military duty; on the contrary, it proves that it was entirely unconnected with his duty as a soldier, being the result of assault by his comrades.

In the case of William M. Brockenshaw, soldier was injured by comrades jumping on him while he was climbing into his bunk. *Held*, injury not incurred in line of duty, having neither a natural nor a logical connection with the military service (1 P. D., p. 194).

In the case of William H. Pike, soldier was wounded by the accidental discharge of a pistol, not a part of his military outfit. *Held*, that the injury was not a proximate cause and did not pertain to or have a direct connection with the service and line of duty (1 P. D., p. 253).

In the case of Carroll M. Wagoner claimant was injured by a comrade accidentally striking him with the butt of his gun and fracturing his skull. *Held*, that the injury did not have a natural or logical connection with the military service or to line of duty in said service (1 P. D., p. 338). See also case of James E. Feriel (1 P. D., p. 329).

In the case of Alexander Gillespie, decided by the Department February 20, 1888, claimant was injured by being struck with a piece of board in the hands of an enraged comrade, resulting in a fracture of his skull. The Department, affirming the rulings in the case of David Smith and Joseph W. Stanley, held that soldiers injured or disabled in personal altercations or quarrels can not be considered as in the line of duty, and no pension, therefore, will be allowed for such injuries or disabilities (2 P. D., p. 16).

The question again came before the Department for consideration in the case of Jesse M. Stilwell (2 P. D., p. 83). The Department rendered the following opinion: "The question involved in the claim is not whether claimant was to blame for the conduct of his assailant, but whether the blow struck was a necessary or even a reasonable incident of line of duty in the service." Following the line of decisions heretofore quoted, the claim was rejected.

In the case of Mary A. Compton, the widow alleged as the basis of her claim an injury received by her husband, deceased soldier, the result of a scuffle in barracks near Baltimore shortly before discharge. The Department held:

Admitting for the sake of argument that the alleged injury in the service resulted in the death of soldier, as contended by appellant, yet it is evident that said injury was not incurred in the line of duty so as to entitle to pension, as construed and held by the Department.

After referring to the cases of Ammerman, Jones, and Wagoner, heretofore cited, the decision concludes as follows:

The above is the settled rule of the Department, and has been held without variation in a long line of decisions; and it is apparent from the circumstances surrounding the incurrence of the alleged injury of the soldier that it applies directly to this claim and is conclusive against the title of appellant to pension upon the grounds upon which she bases her claim. (2 P. D., p. 129).

It is apparent from the foregoing citations that the case under consideration falls within the rule, and was therefore properly rejected.

Your decision is affirmed, and the papers accompanying your letter of transmittal of August 21, 1888, are herewith returned.

SEPARATE DISABILITIES ATTORNEYS' FEE.

MILO B. STEVENS & CO.

Where a claimant files a declaration for pension based upon two separate causes of disability, and, in contract for fee to be paid his attorney, no reference is made to a particular part of the declaration, it is held that the intention of the claimant was to pay the fee named in the contract for the prosecution of the whole claim, embracing *both* or *all* alleged causes of disability, and not for the prosecution of only a part of it.

Assistant Secretary Hawkins to the Commissioner of Pensions, November 10, 1888.

Herewith are returned the papers which accompanied your report of the 5th of November, 1888, upon the appeal of Milo B. Stevens & Co., of this city, from the action of your office in the matter of the fee for their services in the pension claim of Simmons Kelly, Certificate No. 269444.

The said Simmons Kelly was pensioned by certificate issued June 25, 1884, on account of disability resulting from an injury of the left side.

On the 6th of April, 1886, Mr. Kelly filed an application in which he claimed additional pension on account of rheumatism and an increase of disability from injury to side. Milo B. Stevens & Co. were appointed attorneys in the claim, and on the 1st of June, 1886, they filed articles of agreement for a fee of $25.

On the 10th of March, 1887, a certificate was issued granting an increase of pension on account of disability from the injury of the side. A fee of $10 was paid to Messrs. Stevens & Co. They continued to prosecute the claim made on account of disability from rheumatism, and, on the 17th of November, 1887, a certificate was issued to grant pension for rheumatism in addition to that allowed on account of the injury. Upon this issue, the sum of $15, the balance of the fee set forth in the articles of agreement filed June 1, 1886, was paid to the appellants.

The contention of the appellants is that the contract should have been applied to the claim on account of rheumatism, and that a fee of $25

should have been paid to them upon the granting of the pension for the disability from that cause.

At the time the contract for a fee of $25 was entered into, the pensioner had pending a claim based upon two separate causes of disability. The contract reads:

I do hereby agree to allow my attorneys a fee of $25, which shall include all amounts to be paid for any service in furtherance of said claim.

The claim pending was made up of two parts, and no reference is made in the contract to a particular part of it. From the language of the contract it appears that it was the intention of the pensioner to allow the fee of $25 for the prosecution of the whole claim which was pending at the time the contract was made, and not for the prosecution of a part of it.

The action of your office allowing a fee of $25 for the prosecution of the whole claim was in accordance with the language and evident intent of the contract, and is therefore approved.

NEW DISABILITY—ATTORNEYS' FEE.

MILO B. STEVENS & CO. (*Motion for reconsideration.*)

The phrase "a new disability" means a disability not connected as a result with the disability for which pension was first allowed, or a disability the origin of which in the service and line of duty must be proved in the same manner as if it alone were the subject of the claim; and attorneys will not be allowed a fee for an increase of pension on account of an increase of the disability for which pension was originally granted.

Assistant Secretary Hawkins to the Commissioner of Pensions, November 15, 1888.

Herewith is a letter from Milo B. Stevens & Co., of this city, in which they request this Department to further consider the decision of August 3, 1888, in the matter of the fee upon the reissue dated September 23, 1887, of Certificate No. 73332, in favor of Theophilus Sweet.

The said Theophilus Sweet is pensioned on account of disability from a shell wound of the head. He claimed increase of pension on account of the wound and of paralysis of the right arm. Milo B. Stevens & Co. were attorneys in the claim for increase, and contracted for a fee of $25. Upon the allowance of the claim for increase by certificate dated September 23, 1887, a fee of $10 was paid to Milo B. Stevens & Co. The contract for a fee was not recognized for the reason that the increase of pension was granted on account of increase of the disability for which the pension was originally allowed.

It is contended by the appellants that the claim was one for increase of pension on account of a new disability.

The phrase "a new disability" is construed by the Department to *mean a disability not* connected as a result with the disability for which

ıe pension was originally allowed. It refers to a disability having a irect connection with some injury or disease independent of that for hich the pension was in the first place granted. It refers to a dis- bility the origin of which in the service and line of duty must be roved in the same manner as if it alone were the subject of the claim. ; can not properly be construed to embrace anything resulting from ıe progress and development of the original disability.

The claim for increase of pension in the case under consideration was llowed upon the view that the paralysis was a result of the wound of the ead, for which the original allowance was made. The case is therefore ne in which the law prohibits the allowance of a fee of more than $10.

The former decision is adhered to.

PENSIONABLE DEPENDENCE.

AARON HYER.

o pension can be granted to an alleged dependent parent under section 4707 Revised Statutes of the United States, upon the basis of any probable or contingent condition of dependence or of destitution which might happen to said parent, after soldier's death; but said condition must be shown to exist as a matter of fact at the time of soldier's death, and to the extent required by the statute.

ssistant Secretary Hawkins to the Commissioner of Pensions, November 1, 1888.

Herewith are returned the papers which accompanied your report of ctober 20, 1888, upon the appeal of Aaron Hyer, father of Joseph yer, deceased, late private Company C, Fifty-fourth Ohio Volunteers, om your action rejecting his claim for pension as dependent father.

Claimant filed his original declaration for pension August 12, 1884, lleging that he was the father of two sons who died in the military ervice of the United States, and that at the time of their death he as partially dependent upon his said sons for support.

Subsequently claimant elected to prosecute his claim as dependent ather of Joseph Hyer, the soldier above named.

The records of the War Department show that said soldier enlisted eptember 10, 1861, at the age of eighteen years, and died in the serv- e, of *variola*, in hospital near Memphis, Tennessee, August 24, 1862.

The claim was rejected May 26, 1888, upon the ground that claimant, at the date of soldier's death, was able to comfortably support himself and family without the aid of the soldier."

From said action of rejection the claimant appealed August 31, 1888, ontending that the evidence on file in his claim shows his dependence pon the soldier for support at the time of his death, and that the roperty of which he was shown to be in possession, at the time of the oldier's death, belonged to his second wife, and that he was liable to e deprived *of the same by* her heirs and left in a destitute condition.

OPINION.

The evidence on file in this claim is sufficient to establish the fact that the appellant had two sons who enlisted in the Army, and who both died in the service, one of whom was the soldier on account of whose service and death this claim is made. It appears also that both of said sons were minors at the time of their said enlistment and death, that prior to entering the service they had lived with the appellant, their father, and assisted him to work upon his farm, and that they were both unmarried and died without issue surviving. It is shown that the soldier, Joseph Hyer, contributed $90 to the appellant while in the service, and that his mother, the first wife of appellant, died in 1845. It appears that the appellant married a second time in 1850, that his second wife died in 1866, and that she was possessed of some property, which was inherited by her children. The appellant married a third wife in 1868, with whom he is now living.

The only question to be determined upon this appeal is, whether the appellant was dependent in whole or in part upon the soldier at the time of his death.

The appellant appears to labor under a misapprehension as to the nature and extent of the law conferring the right to pension upon a dependent parent. The dependence upon the soldier for support must be shown to have existed at the date of his death in order to give title to pension on that account, and said pension can not, by the express terms of the statute (section 4707 Revised Statutes of the United States), be paid for any period during which it is not shown to be necessary as a means of adequate subsistence to the parent. In order to determine the right of the appellant to pension as the dependent father of the soldier, it is necessary to examine the evidence on file in the light of the foregoing statute, and to determine whether it establishes the conditions of dependence required thereby.

It is clear that no pension can be granted under said statute upon the basis of any *probable* and *contingent* condition of dependence or of destitution which might happen to the appellant, but the said condition must be shown to exist as a matter of fact, at the time, and to the extent required by the statute.

It is incontestably shown by the evidence that, at the date of the soldier's enlistment and during the period of his service in the Army, the appellant owned and occupied a small farm from which he derived a comfortable support. It is true that the loss of the services of his sons in managing and conducting said farm may have resulted in inconvenience to the appellant, reducing his income derived therefrom; but it is, nevertheless, clearly shown to be true that he succeeded in maintaining himself comfortably, and suporting himself and family upon said farm after he was deprived of their services during the time of their army service, and for many years after their death.

The result of the special examinations had in this claim is to establish, beyond dispute, that the appraised value of the property owned by appellant in 1861 was over $5,000; in 1871 over $6,000, and in 1884 about $10,000; that in 1862 the taxes paid by him were $46.51, and that since that time, up to 1884, they have averaged about $75 annually.

The foregoing facts preclude the existence of such a state of dependence upon the soldier at any time as would warrant a grant of pension to the appellant as a dependent father within the meaning of said section 4707 Revised Statutes of the United States, or that said pension has ever been necessary as a means of adequate subsistence for him.

For the above reasons, your said rejection of this claim is affirmed.

MEXICAN WAR—SERVICE PENSION.

GEORGE H. BROCKMAN. (*On motion for reconsideration.*)

The act of January 29, 1887, providing service pensions for survivors of the Mexican war, requires that claimants shall have either actually served in said war or been en route to Mexico and to the seat of war, or ordered away from their place of rendezvous and organization for that purpose.

Assistant Secretary Hawkins to the Commissioner of Pensions, October 27, 1888.

I have carefully considered your communication of October 16, 1888, transmitting to this Department, for reconsideration, the papers in survivors' service pension claim, Mexican war, No. 689, of George H. Brockman, late a member of Powell's Oregon Battalion, Missouri Mounted Volunteers, in which this Department, under date of December 20, 1887, affirmed the action of your office in rejecting said claim. You also transmit with said communication and said papers an amended report of the Adjutant-General, U. S. Army, dated September 29, 1888, relative to said battalion, and invite the attention of the Department to the same, with the request that you be informed as to whether said amended report is sufficient to change or in any manner modify the former departmental action in this and in all similar cases.

While it is evident that both your office and this Department have been led into an error by the former reports of the War Department, giving the service and the official record of the organization of said battalion, and as to the act of Congress under which said battalion was organized, yet it is the opinion of the Department that said error is not material to the proper determination of the questions which were presented in the former departmental decision in this claim, and does not affect the grounds upon which said former action was taken.

It appears by the present report of the Adjutant-General, correcting the former one, that said battalion was in fact organized and raised

under and by virtue of the act of May 13, 1846, for service in the Mexican war; that the regiment of mounted rifles, now known as the Third Cavalry, U. S. Army, was the organization which was in fact raised under and by virtue of the act of May 19, 1846, and that, instead of being assigned to the duties and service designated in said latter act, said regiment of mounted rifles was sent to and engaged in active service in the Mexican war, while Powell's Missouri Battalion was assigned to the duty of establishing the line of communication with Oregon and guarding the line of posts therein, as provided by the sixth section of said act of May 19, 1846. In other words, the designation and the service of these two organizations, as provided by the acts under which they were respectively raised and organized, were exactly transposed, said regiment of mounted rifles being sent to Mexico and said battalion being ordered to do duty upon the route to Oregon.

This can not affect the status of the claimant nor of the other men enlisted in said battalion under said act, for, as was clearly shown and fully discussed in said departmental decision in this case (vol. 1, Pension Decisions, page 453), the vital fact in the case was found to be that their service was not of that character which would include them within the second and third classes of persons who are mentioned as entitled to the benefits of the act of January 29, 1887.

This view is not in conflict with the spirit of the ruling (No. 223) by the Commissioner of Pensions, which, from your communication, you evidently suppose would entitle the claimant to pension under the existing state of affairs. That ruling is simply to the effect that, if the claimant enlisted in an organization for the Mexican war and started en route for the seat of war, but was detained and held awaiting orders, or diverted from the direct route to the seat of war by command of the Government, he would still be considered as en route within the meaning of those terms, as used in said act of January 29, 1887, and he would be entitled to pension, provided his said service continued for the requisite length of time.

In this case, as was distinctly shown, in said former departmental decision, this organization and the soldiers composing it never were at any time en route to Mexico and the seat of war. They were never ordered away from their place of rendezvous and organization for that purpose, but for an entirely different purpose; and their services were performed in a portion of the country and at a time which precluded them from sharing in the benefits of said act.

You are therefore informed, that, in the opinion of the Department, the erroneous record of the War Department, and the error as to the organization of said battalion into which your office and this Department alike were thereby led, does not afford sufficient ground to require an amendment or change in said departmental decision, or in the action of your office in this and similar cases.

INCURRENCE—PENSIONABLE DISABILITY.

JEREMIAH EVERLY.

Where there is neither record nor medical evidence to show the existence of the alleged disability in the service, and claimant fails to show the existence after discharge of a pensionable disability which was incurred by reason of the service, the claim should stand rejected. Lay testimony alone, furnished twenty years subsequent to the alleged incurrence of the alleged disability, can not be accepted as sufficient to establish claimant's declaration.

The Department re-affirms the rule that, "where questions of a purely medical character are involved, it must be governed by its medical advisers, and the opinion of the medical referee in such cases is generally held to be conclusive."

sistant Secretary Hawkins to the Commissioner of Pensions, November 15, 1888.

I have considered the appeal of Jeremiah Everly, late private Comny A, First Maryland Cavalry (Potomac Home Brigade), claim No. 1,258, of September 24, 1888, from your office decision of July 28, 88, rejecting his claim for invalid pension on the ground of "no ord or other satisfactory evidence that the alleged disease of eyes is e to his military service."

You state in your report of the case to the Department, under date November 7, 1888, that—

he records of the War Department show that appellant enlisted August 10, 1861; orted on roll to August 31, 1861, present; September and October, 1861, not on file; sequent rolls to June 30, 1862, present; roll to October 31, 1862, (4 months), absent, oled prisoner, at Annapolis, Md.; roll to December 31, 1862 (6 months), same report; sequent rolls to June 30, 1863, present; subsequent rolls to February 29, 1864, pres-. Re-enlisted as a veteran volunteer February 14, 1864; March and April, 1864, ent on detail service, at Halltown, Va., since April 29, 1864. Roll to August 31, 4 (4 months) present; subsequent rolls to April 30, 1865, sergeant, present. Mused out with company June 28, 1865, at Harper's Ferry, Va. Return for July and gust, 1863, does not report him absent. Company was in action September 14, 2, near Leesburgh, Va., and September 14, 1862, at Maryland Heights, Md.

risoners of War Records show him captured and paroled, Harper's Ferry, Septber 15, 1862; reported at Camp Parole, Maryland, date not stated, and sent to shington, September, 1862. No record evidence of alleged injuries.

e alleged in declaration filed June 3, 1882, for pensionable cause, that, at Waterl, Va., about August 7, 1863, he was thrown from his horse while in a charge on enemy, and fell in a pile of men and horses, thereby injuring his left side and left , and that he was not treated in hospital for said injuries.

he claim was rejected July 28, 1885, on the ground of no record or other satisfacy evidence that the alleged disease of eyes is due to his military service. Medical erts state that present condition, in their opinion, is not due to injury received nty-two years ago. Injury to left side rejected on medical grounds.

ubsequently the Bureau opened the case and referred the papers to the Special amining Division, to determine all the facts relative to origin and continuance of h injuries.

* * * * * * *

Dr. Craigen, the examining surgeon, under date November 8, 1882, says: "Claims to have received an injury in the left lumbar region. The symptoms are subjective. No marks or scars to be seen upon inspection. The pupil of the left eye is more dilated than the right; otherwise there is no apparent injury to the left eye."

The board at Washington, D. C., April 24, 1884, says: "There is no cicatrix or other evidence of injury of the left side; a slight roughness over region of mitral valves, but we are not satisfied of any pensionable disability from this cause, or that it results from injury alleged. Cataract of left eye, on which iridectomy has been performed in upper margin; eye useless for purposes of vision, and cataract forming in right eye; but present condition is not in our opinion the result of alleged injury twenty-two years ago."

The board at Cumberland, Md., December 8, 1886, says: "The claimant has no evidence of injury to or structural changes of the left side, including (practically) the lumbar region. There is no positive disease detected over the chest by auscultation or percussion; the expansion of the chest is 34 to 37 inches; specific gravity of urine is 1.012; acid reaction of a turbid, cloudy, light color; heat and nitric acid does not show albumen. No pus; no evidence of epilepsy, no marks on tongue, ankle clonus normal, patella reflex normal. Has a linear cicatrix 1 inch long over the left coronal suture, upper edge of temporal fossa. This does not constitute a disability. The left eye totally blind even for light; iris partially removed by iridectomy; pupil fully dilated; lens reddish-grey in color, and has a flocculent appearance; conjunctiva congested. Right eye, pupil normal in size and reacts well; intraocular tension normal; iris clear; unable to see retina from cloudiness of vitreous humor; V. R. E. 12.160 Snellen; unable to read. The large greyish pupil of left eye is considerably deformed; a member of this board used hypodermic injections of morphia four years ago for pain in the region of left kidney, the cause of which was not discoverable. No evidence of syphilis."

The claim was again rejected March 31, 1887, on the ground that the evidence adduced upon special examination failed to show that present condition of eyes resulted from any injury received in the service or otherwise due to his military service, but, on the contrary, such evidence tends to show that such condition is entirely independent thereof, and that it developed since discharge. That portion of claim which pertains to injury of left side is rejected upon the ground that the evidence adduced failed to satisfactorily show the incurrence of an injury in that particular locality in the service, and it is apparent that no disability has existed therefrom since date of filing claim. All sources exhausted. While some little evidence was adduced purporting to show injury, it does not show any injury of a permanent character and appears to have been confined to the head. Affiants said to be biased in favor of claimant who testify on such points.

The appellant and his attorney were immediately informed of the ground of rejection. Subsequently appellant was repeatedly informed of the adverse action. On May 12, 1888, he filed the testimony of T. B. Brown, who swears that appellant has suffered from pains in his left side and from sore and weak eyes since fall of 1865, and that of Patrick Mills and J. B. Hooker who swear that appellant has complained of his eyes and side since 1868.

Appellant was again informed on July 16, 1888, that this testimony fails to change the status of his claim. He was again informed on August 13, 1888, that this Bureau had extended to him every possible facility within its power to establish title to pension, but that he had failed to supply the necessary evidence to show that he suffers from any disability due to his military service.

The contention of appellant is in substance that the evidence establishes incurrence and a pensionable disability.

While the lay testimony, if taken alone, might be sufficient to estab-

lish incurrence, yet this testimony is not entirely harmonious, but conflicting. The witnesses, testifying to the incurrence, testify over twenty years subsequent to the occurrence of the events about which they testify. Such testimony should be corroborated by either record or medical evidence. There appears to be an absence of both record and medical evidence as to incurrence. There is also a failure of claimant to establish a pensionable disability. While claimant's vision is undoubtedly impaired, the expert medical evidence in the case tends to show that the condition was not the result of the alleged injury twenty-two years previous. Where there is no record nor medical evidence to show the existence of the alleged disability in the service, and claimant fails to show the existence of a pensionable disability due to the service, the claim should be rejected, the lay testimony alone, furnished over twenty years subsequent to the alleged incurrence, being insufficient to support claimant's declaration. (See case of Albert Worthley, 2d Pension Decisions, page 212.)

It was held by the Department in the case of Mary Farrar, (2d Pension Decisions, page 189), affirming the case of Arad P. Brown (2d Pension Decisions, page 88), that lay testimony, when unsupported by the record or by direct medical evidence, and which is dated years after claimant's discharge, cannot be accepted as proof of the incurrence of the alleged disability in the service. (See also the cases of Fritz Mueller, 2d Pension Decisions, page 192; Levi Reeves, *Ibid.*, 177.)

So far as the medical portion of the case is concerned, which involves the question as to continuance of claimant's alleged disability in a pensionable degree, the claim comes within the rule of the Department as announced in the case of Isaac Sell (2d Pension Decisions, page 172), viz: "The Department uniformly holds that, where questions of a purely medical character are involved, it must be guided by its medical advisers, and the opinion of the Medical Referee in such cases is generally held conclusive." (See William H. Garrison, decided by the Department September 10, 1887, 1 Pension Decisions, p. 262; also cases of Joseph F. Ennis, *Ibid.*, p. 127; Lucinda Gaskell, *Ibid.*, 29; Patrick Preston, *Ibid.*, 41; Joseph F. Faulkner, *Ibid.*, 262; Uriah W. Romine, *Ibid.*, 299; Henry Mulholland, 2 Pension Decisions, p. 75, and cases there cited.)

In accordance with the rules of the Department, as announced in the foregoing cases, your decision is affirmed, and the papers accompanying your letter of transmittal of November 7, 1888, are herewith returned.

BOARD OF SURGEONS' CERTIFICATES.

FRANCIS N. BARNARD.

The certificate or report of a board of examining surgeons, in determining the nature and degree of a disability, should be given precedence over an examination by a single surgeon; and the certificates of examining surgeons can be neither set aside nor controverted by affidavits of family physicians or of neighbors, especially where such certificates are made by boards of examining surgeons who, acting under instructions from the Bureau of Pensions, certify to the nature and degree of a disability, after careful investigation.

Assistant Secretary Hawkins to the Commissioner of Pensions, November 2, 1888.

I return herewith the papers in the case of Francis N. Barnard, late of Company K, One hundred and fifth Regiment, Ohio Volunteers, the same having been considered by me in adjudicating claimant's appeal from the action of your office adverse to his claim for invalid pension No. 415407.

Claimant enlisted August 9, 1862, was discharged March 27, 1863, and filed his declaration February 8, 1881, alleging that "in the service and in the line of duty at Munfordville, Ky., on or about November, 1862, from exposure and hardships, he was taken sick with measles, which resulted in a permanent disease of the heart." In an affidavit, sworn to and subscribed February 3, 1881, claimant says:

I now observe that there is a mistake in my application for a pension, and respectfully request that the same be corrected. The following is the origin of my disability: While on a forced march from Richmond, Ky., to Louisville, Ky., about September, 1862, from exposure I was partially sun-struck, and contracted disease of heart; also at Munfordville, Ky., November, 1862, as stated in my application, I was taken sick with measles. The measles is not the direct cause of heart disease, but, since having the measles, the heart disease has become worse, making it a permanent disease.

The report of the Surgeon-General's Office, having reference to hospital treatment of claimant, says that—

Francis N. Barnard, private Company K, One hundred and fifth Ohio Volunteers, was admitted to No. 1, General Hospital, Louisville, Ky., December 20, 1862, with scrofula, and transferred December 26, 1862; that he was admitted to Washington Park General Hospital, Cincinnati, Ohio, December 27, 1862, with *carditis*, and transferred January 10, 1863, and that he was admitted to Camp Denison, Ohio, January 10, 1863, with palpitation of heart, and discharged from service March 27, 1863.

The certificate of disability upon which claimant was discharged from service, March 27, 1863, states, over the signature of John I. Carpenter, that claimant was found upon examination to be "incapable of performing the duties of a soldier because of disease of the *aortic and mitral valves*."

The incurrence of sun-stroke in the service, as alleged by claimant, is proved by affidavits of Comrades Orrin Snedeker and Edward Potter, who claim to have been eye-witnesses of the fact.

The continued existence of heart disease after discharge from the ervice, as alleged by claimant, is certified to by Dr. W. J. Scott, of leveland, Ohio; Dr. A. L. Pomroy, of Windsor, Ohio; Dr. Charles Bell, f Cleveland, Ohio, and Dr. O. J. Brown, each of whom says under ath that he treated claimant for said disease, a number of them attributing it to the alleged sun-stroke.

On the contrary, the board of surgeons at Cleveland, Ohio, report an xamination made of claimant March 14, 1883, saying:

Applicant is well nourished; red face; under the influence of alcohol at present ime. There are no physical signs of disease of heart; the heart sounds are normal nd free from added murmurs. Applicant complains of giddiness and sleeplessness, nd numbness of fore-arms after sleeping. We find no disability whatever with this nan not attributable to his habits of intemperance.

Again, the board of surgeons at Cleveland, Ohio, composed of different persons from those constituting the board formerly, made, under instructions from your office, a careful examination of claimant May 12, 1886, and reported, saying:

A careful examination by palpation, percussion, and auscultation discovers no evidence of any disease of heart. Apex beat in normal site; both sounds at apex and base are clear and distinct, and not accompanied by murmurs. * * * No tenderness along spine. Both lungs on examination prove to be normal. We find no evidences of heart diseases. We find claimant to suffer from partial amaurosis. No rating for heart disease; no rating for sun-stroke.

The foregoing reports of examinations made of claimant in 1883 and 1886, by two different boards of surgeons, go to disprove the grounds upon which rests claimant's declaration for pension, and, guided by them, your office rejected the claim; whereupon claimant filed an appeal to the Secretary of the Interior, but no action was taken thereon by the Secretary. You say in your report, in response to departmental reference of July 31, 1886, that—

The appeal in this case was returned to the Department May 31, 1887, for dismissal, on the ground that the claim had been reopened under Order No. 133. The papers were immediately referred to the proper adjudicating division for consideration and action; thereupon the one hundred days' circular was mailed, June 6, 1887, to the attorneys, in which evidence was called for to establish appellant's claim. No evidence having been filed in response to said circular, and upon the expiration thereof, the claim was again rejected, November 15, 1887, upon the opinion of the medical referee, to wit: On the ground that it is shown as a fact that no pensionable disability from alleged cause has existed since date of filing claim, from alleged disease of heart and results of sun-stroke."

It thus appears that upon a full review of the medical evidence in the accompanying papers, wherein the examinations made by certain *single* surgeons are shown to have resulted differently from the examinations made by two boards of examining surgeons at Cleveland, you reach the conclusion, stated by the medical referee, to the effect that claimant has suffered "no pensionable disability" from alleged cause—heart disease and results of sun-stroke—since the date of filing his claim for pension. The preference thus given by you to the certificates of boards *of surgeons over the* testimony of either family physicians or

single surgeons is consistent with the long-established rulings of the Department, which, recognizing the principle that an examination by a board of surgeons should take precedence over an examination by a single surgeon, has customarily held that examining surgeons' certificates can be neither set aside nor controverted by the testimony of family physicians or of neighbors, especially where such certificates were made by a board of examining surgeons, who, acting under instructions from your office, reported the nature and degree of a disability, based upon careful examination of the party in interest.

The issue in this appeal involves a medical question such as, in the solution of it, the formally expressed opinion of the medical referee generally controls, and, accepting as correct the rule here indicated, I decline to disturb the action of your office based upon the medical referee's opinion in the case.

The rejection of the claim is accordingly affirmed.

ORIGIN OF DISABILITIES.

WILLIAM O. MCMURPHY.

Where claimant's own statements as to the origin of his alleged disabilities are conflicting and contradictory, and a special investigation fails to show that said disabilities either originated in the line of duty or were due to the service, the claim for pension should be rejected for lack of evidence to sustain it.

Assistant Secretary Hawkins to the Commissioner of Pensions, November 19, 1888.

Herewith are returned the papers which accompanied your report of November 13, 1888, upon the appeal of William O. McMurphy, late private Company F, First Michigan Volunteers, from your action rejecting his claim for invalid pension, No. 254618.

Appellant enlisted July 13, 1861, and was discharged August 12, 1862, on surgeon's certificate of disability, because of chronic arthritis of knee-joint, preventing the perfect use of leg. He filed his original declaration November 15, 1862, in which he claimed pension for chronic arthritis of knee-joint, preventing the perfect use of leg, and which was occasioned by the falling of a limb of a tree, striking appellant, the first day of July 1862, at Malvern Hill, Virginia.

On the 7th day of May, 1864, the appellant wrote a letter to your office, of which the following is a copy:

POST HOSPITAL, CAVALRY DIVISION,
DEPARTMENT OF WASHINGTON,
May 7, 1864.

To the COMMISSIONER OF PENSIONS,
Washington, D. C.:

SIR: Some time in the fall of 1862, about the 1st of October, I applied for a pension, sending in my discharge from Company F, of the First Michigan Infantry, together with some certificates stating where and when I was wounded.

At the time that I applied for the pension I had a knee-joint that was stiff; a short time after I fell, breaking the joint loose, and recovered the free use of my leg again. So of course I do not want a pension, for I have enlisted again in a cavalry regiment; but I do want that discharge and those certificates, or an official copy of them, and if you will forward them to me as soon as convenient, you will greatly oblige

Your most obedient servant,

WILLIAM O. MCMURPHY,
Sergeant Post Hospital, Camp Stoneman, Washington, D. C.,

On the 8th day of May, 1872, appellant filed another declaration for pension, and therein alleged "loss of forefinger, left hand, July 1, 1862, at the battle of Malvern Hill, Virginia; also received wound of right knee, which caused varicose veins; pieces of bone came out."

In a subsequent statement, June 11, 1879, he alleged that, in the action at Gaines Mills, Virginia, June 27, 1862, he was wounded by a ball of the enemy in the tip end of his left forefinger, and that on July 1, 1862, he lost the joint, as alleged, at Malvern Hill.

You state in your report that "the evidence secured during the pendency of this claim indicated that it was fraudulent, and, to conclusively establish the facts as to origin of injuries in service and line of duty, the claim was referred for a thorough investigation by special examiner, resulting from which the claim was rejected March 1, 1883, upon the ground that the evidence shows that 'the gunshot wound of left forefinger was purposely self-inflicted, and the disability of right knee and resulting varicose veins was incurred *after* discharge from the service.'"

You further state that "the claimant has filed additional evidence in his claim since the rejection, which does not affect the material facts upon which the rejection is based, and furnishes no good or sufficient reason to grant a further special examination."

From the rejection claimant appeals, his contention being that an injustice has been done him; and he asks that a further special examination of his claim be had.

The evidence obtained on special examination fails to corroborate the appellant in any of his allegations as to the origin of his wounds or disabilities. But, on the contrary, it is clearly shown by the testimony of General William A. Throop and by Private Henry Feige that appellant deliberately shot off his own finger at the battle of Gaines Mills, June 27, 1862, before the company was under fire of the enemy.

In regard to the injury of knee which the appellant alleges to have received at Malvern Hill, it seems impossible to get at the exact facts, and his own declarations are so widely contradictory and so unworthy of credit that I have no aid from them. Henry Feige, a reliable witness, says he feels sure appellant was not in the battle of Malvern Hill at all.

The depositions of William H. Fisher and George Smith tend to show the same thing, and show also that appellant was "dodging" about the rear to keep out of reach of the fire of a rebel.

Appellant stated before the special examiner that about 1870 he was handling logs, when he stepped on a round log and fractured one bone above the right ankle, and the doctor said the other bone was cracked below the knee. He was entirely disabled over three months at that time.

Dr. O. D. Hamilton's testimony shows that in 1874 the appellant incurred a severe fracture of the right leg—both bones—to which is undoubtedly due most of the existing disability.

Taking into consideration all the facts in this case, and appellant's own stories—once that his knee was hurt by a limb of a tree; another that it was by a spent ball, just after Dr. Tencliffe dressed his finger, at Malvern Hill; and then his letter of May 7, 1864, in which he said he had a "joint that was stiff," but that it had got well—I feel justified in coming to the conclusion that appellant has no wounds or injuries that were received in the service and line of duty.

Your action rejecting this claim, on the grounds stated in your report herein, is affirmed.

SERVICE PENSION—MEXICAN WAR.

ANNIE, WIDOW OF JOHN QUINN.

The act of Congress, approved January 29, 1887, does not provide a service pension for every person who was in the military service of the United States during the Mexican war, but limits and expressly designates those to whom such a pension may be granted, the character and extent of the pensionable service being specifically described. Proof of actual participation in the war sixty days with the Army or the Navy, or on the coast or frontier of Mexico, or en route thereto, is necessary to establish a claim to pension.

Assistant Secretary Hawkins to the Commissioner of Pensions, October 20, 1888.

Herewith are returned the papers which accompanied your report of September 28, 1888, upon the appeal of Anne Quinn, widow of John Quinn, deceased, late sergeant Company D, First United States Infantry, from your action rejecting her claim for pension.

Claimant filed her declaration for pension April 11, 1888, alleging, as the basis of her claim, that she is the widow of the soldier, that he served in the war with Mexico, and that she is entitled to a service pension under the act approved January 29, 1887.

The records of the War Department show that the soldier was originally enlisted in the regular Army of the United States on the 12th day of June, 1840, assigned to Company D, First United States Infantry, discharged at Fort Snelling, Iowa Territory, April 24, 1845, reenlisted on the same date in the same organization, and was discharged at Fort Duncan, Tex., April 24, 1850, by reason of expiration of term of service.

Said records show that said company was stationed as follows: At Fort Armistead, Fla., from December 8, 1840, to May, 1841; Cantonment Morgan, E. T., from May, 1841, to August 5, 1841; Fort Snelling, Iowa Territory, from September 14, 1841, to September 30, 1848; Camp Houston, near Fredericksburgh, Tex., from December 5, 1848, to March 10, 1849; and at Fort Duncan, Tex., from December 21, 1849, to date of final discharge.

The claim was rejected July 5, 1888, upon the ground that the company to which the soldier belonged was not in Mexico, nor on the coast or frontier thereof, nor en route thereto during the war with that nation, and that the soldier had not performed the service required by said act of January 29, 1887, necessary to entitle the claimant to its benefits.

From said action of rejection the claimant appealed July 24, 1888, contending that the status of the soldier, necessary for pension under said act, has been recognized and adjudicated by the accounting officers of the Treasury Department, in that they have paid to the widow (this appellant) the three months' extra pay under the acts of Congress approved July 19, 1848, and February 19, 1849, as shown by record furnished by the Second Auditor of the Treasury Department.

OPINION.

As has been said in a late decision of this Department in another claim arising under this act—

The act of Congress of January 29, 1887, under which the claim of appellant for pension is made, does not undertake or propose to provide a pension for every person who was in the military service of the United States during the Mexican war, but limits and expressly designates those to whom a pension can be granted under said act, specifying in express terms the character and kind of service in said war which will entitle to pension. By the terms of said act the Secretary of the Interior is authorized and directed to place on the pension roll the names of the surviving officers and enlisted men, including marines, militiamen, and volunteers of the military and naval service of the United States, who, being duly enlisted, actually served sixty days with the Army or Navy of the United States in Mexico, or on the coast or frontier thereof, or en route thereto in the war with that nation, etc. (See case of Muse., 2 P. D., 180.)

It is obvious that, as a prerequisite to claiming any benefits under said act, it should appear not only that the person seeking its benefits was in the service of the United States during the time that said war was in progress, but that he did actually serve for the period of time and render the particular service therein designated, to wit, that he had actually served sixty days with the Army or Navy of the United States in Mexico, or had served sixty days on the coast or frontier of Mexico, or served sixty days en route thereto during the war with that nation, or had been engaged in a battle in said war, irrespective of length of service, or had been personally named in some resolution or act of Congress for special or specific service rendered in said war. In this claim, it is apparent at the outset that the soldier could

not have performed any of the above designated services in said war, for the reason that it is shown by the official record of his military service that he was present with his command continuously from the date of his enlistment to his final discharge, and that said command during the whole period of time that said war was in progress was stationed at Fort Snelling, a military post located in the State of Minnesota, near the city of Minneapolis, in a portion of the country known at that date as Iowa Territory, a point as remote from the scene of hostilities and the field of operations of the Mexican war as was possible.

This would seem to be all that it would be necessary to state, in order to show the fallacy of the appellant's claim for a pension under said act; but the Department will state further, in reply to the contention of the appellant as to the status of the soldier having been determined by the grant of extra pay to the appellant, as his widow, by the accounting officers of the Treasury, that, so far as said grant may be concerned as establishing the right of the soldier to pension under said act, it can have no possible weight, for the reason that the acts of Congress cited by the attorney of appellant, and under which said payment was made to her, do not require the same service or the same conditions to entitle to said grant as does the act of January 29, 1887, to entitle to pension, and, consequently, whether or not said grant of extra pay to appellant was proper, it can have no weight in determining her right to pension as the widow of the soldier under the act of January 29, 1887.

Your action rejecting this claim, upon the ground set forth in your report herein, is affirmed.

MINOR'S CLAIM.

JULIA M. B. AND SUSANNA WILKERSON.

The Department holds that conclusive evidence, showing the date of birth, and therefore the correct age of a minor at the time of soldier's death, is necessary to the allowance of a minor's claim to pension.

Assistant Secretary Hawkins to the Commissioner of Pensions, November 13, 1888.

Herewith are returned the papers which accompanied your report of October 19, 1888, upon the appeal of Julia M. B. Wilkerson, now Gray, and Susanna Wilkerson, now Jones, children of Henry M. Wilkerson, deceased, late private, Company G, Forty-eighth Kentucky Volunteers, from your action rejecting their claim for accrued pension as minor children of said soldier.

The soldier enlisted August 20, 1863, and died November 5, 1863, in hospital, by reason of disease contracted in the service. His widow died November 21, 1880.

The claimants filed their joint application, September 15, 1884, alleging that they were the children of the soldier, were under sixteen years

of age at the time of his death, and were entitled to pension, as such, from the date of soldier's death until they arrived at the age of sixteen years. Their claim was rejected June 20, 1888, upon the ground of inability to furnish the evidence necessary to complete it.

From this action of rejection the claimants appealed August 15, 1888, contending that a marriage at common law has been established by testimony showing that their parents lived together as man and wife, and were regarded by their neighbors as such, and that claimants' statements as to date of birth are sufficient to prove the same under the rule of admission in pedigree.

OPINION.

The evidence on file in this claim sufficiently establishes the facts of the soldier's service and death, and, also, the death of the mother.

The appellants are unable to furnish record evidence of the marriage of their father and mother, or any evidence going to show that they were lawfully joined in matrimony; but the testimony on file, of cohabitation, reputation, and recognition, is sufficient to establish a good marriage at common law between the parents of appellants, and will be accepted as sufficient.

The question of legitimacy is also set at rest by section 3, chapter 52, of the revised statutes of Kentucky (in which State the parties resided), which section provides that the issue of an illegal or void marriage shall be legitimate; and hence the appellants in this case will be considered as the legitimate children of the soldier and his wife.

The difficulty in this claim, however, is not to determine the legitimacy of the children or the legality of the marriage relation existing between the father and mother of the appellants, but to arrive at the correct ages of the appellants, in which matter the testimony produced gives but little assistance.

Before a pension can be granted the appellants, it is evident that this question must be definitely settled, for the obvious reason that they would be in any event entitled to pension from the date only of the death of the soldier until the date at which they respectively reached the age of sixteen years; and hence, to determine the duration and amount of the pension to which the appellants would be entitled as the minor children of the soldier, it is imperatively required that their ages at the date of his death be accurately and positively determined.

The appellants themselves state that Julia M. B. was born March 7, 1855, and Susanna on June 18 or 26, 1852. They declare their inability to furnish a verified copy of the church record of their baptism, or family record, or the testimony of any person who was present at the birth of either of them. They state that they have no knowledge of the place where either of them was born, but have understood that their parents *migrated to Kentucky from* Tennessee, and that they were both born *before their parents went into* Kentucky.

The only witnesses who appear to have any knowledge of the soldier or of his family, either prior to or shortly after his removal from the State of Tennessee to the State of Kentucky, are G. W. Grimmer and Elijah L. Jones. The former of these witnesses states that the first time he ever saw the soldier he was coming down the Tennessee River with his (soldier's) family, that he thinks that this was about the year 1854, and the appellants were upon the boat at the time; that Susanna was the larger of the two, and he thinks that she was about four or five years old at the time; and that Julia M. B. was a year or so younger. It is to be observed that this testimony places the arrival of the family in Kentucky about one year before Julia M. B. alleges she was born, and that her age at that time is stated to be three or four years. This witness also states that Susanna was then four or five years of age, which, if accepted as approximately correct, would make her age two or three years *more* than she alleges it to be.

The latter witness (Mr. Jones), states that he first made the acquaintance of the soldier and his family in 1855 or 1856, and that his family then consisted of his wife and two daughters, the appellants. He further states that he thinks that Susanna was six or seven years old at that time, and that Julia M. B. was about two years younger—that is, that Julia M. B. was four or five years of age in 1855 or 1856, which makes her age four or five years more than that given by herself.

No other witnesses testify with any definiteness as to the ages of the appellants.

The difficulty of deciding, and even the impossibility of approximating, with any degree of exactness, the ages of the appellants, will readily be seen from the above references to the testimony. It is apparent that, even in the absence of any other good reason for not accepting the statements of the appellants in regard to their own ages as sufficient, the testimony on file renders their statements extremely unreliable and creates a very grave probability that they are not true, although they may be accepted as having been made in perfect good faith. It would seem that these appellants have lost every trace which might lead to the discovery of the former domicile of their parents, and consequently of all testimony which might enable them to definitely fix their ages. Ordinarily it is not easy to conceive how the appellants could have so completely lost all trace of their antecedents prior to their arrival in Kentucky, as well as those of their parents, and it is their misfortune that they can not furnish the evidence of this fact, necessary as it is to the allowance of their claim; but, under the existing circumstances, it is not seen how either your office or this Department can afford them any relief in the premises. The claim most undoubtedly can not be admitted in its present condition. A more diligent search upon part of appellants may result in obtaining such evidence as to the date of their birth as will secure the admission of their claim; but until this has been furnished the rejection of the claim can not be deemed error, and is accordingly affirmed.

DEATH CAUSE—ESTOPPEL.

LAURA, WIDOW OF JOHN L. WRIGHT.

Where a soldier failed in his original declaration to allege rheumatism as a disability, and failed, also, to furnish the Department with evidence of its existence during his life-time, the presumption arises that said disease did not exist in the service and did not result therefrom. This presumption is so strong as not to be overcome or out-weighed by the testimony given years subsequent to discharge by officers, comrades, and neighbors, unsupported by either record or medical evidence as to the existence of rheumatism in the service or immediately thereafter; and the aforesaid failure to allege rheumatism serves to estop the present allegement of that disease as the cause of soldier's death, for the purpose of securing widow's pension.

Assistant Secretary Hawkins to the Commissioner of Pensions, November 17, 1888.

I have considered the evidence in the case of Laura Wright, widow of John Wright, deceased, late private Company D, Fifteenth Indiana Infantry (No. 316,908), of October 1, 1888, on appeal from your decision of July 31, 1888, rejecting her claim for widow's pension upon the ground that "soldier's death from paralysis of the heart was not due to service."

Appellant's assignment of error is that your office "erred in holding that the death of soldier was not the result of disease contracted in the military service of the United States."

The soldier enlisted June 16, 1861, was discharged July 9, 1862, and filed a declaration for invalid pension July 6, 1869, for the following disability, to wit: "Chronic bronchitis contracted in the service near and at the time of the battle of Rich Mountain, and by subsequent exposure at Cheat Mountain and Elk Water, in camping out without tents." He alleges, also, that he took cold by such exposure, which caused bleeding at the lungs, followed by bronchitis, and that this disease affects him and has done so "ever since leaving the service." He died November 2, 1872, of paralysis of the heart, without having completed his claim for invalid pension.

The widow of the soldier filed her declaration June 17, 1884, alleging death "due to chronic diarrhœa and bronchitis contracted while in the service," which she subsequently amended by the allegation that death was due to an "affection of the heart, the result of rheumatism contracted in the service."

The certificate of disability upon which the soldier was discharged certifies that he was "incapable of performing the duties of a soldier because of chronic bronchitis, contracted on or about the 23d of February, 1862, at Camp Wickliffe, Kentucky. He is also greatly debilitated *from diarrhœa, which* he has had since December, 1861; not *able to march and carry* knapsack. Disability one-fourth, caused by *exposure.*"

The medical referee rendered the following opinion in the case, November 16, 1886:

It is impossible to say positively what was the cause of death in this case. The paralysis of the heart mentioned in evidence was the mode of death, and should not be considered as a disease. The suspicion is certainly very strong that death was caused by an overdose of chloral, and the symptoms described are not inconsistent with such a cause, in my opinion. I do not think it necessary that the odor should be noticeable in the room, if the chloral had been taken. There is, however, some evidence tending to show that the soldier had not taken any chloral for some time, at least, before time of death; and if the legal branch of the office is satisfied that no chloral nor other narcotic drug was taken by the soldier within twenty-four hours of death, it is thought that death can be accepted—giving claimant the benefit of a doubt—as due to the disease of heart, result of rheumatism. I do not believe there was any connection between death cause and bronchitis and diarrhœa of record.

The foregoing opinion must be held conclusive of the rights of claimant in this case.

The failure of claimant, in his original declaration for invalid pension, to allege rheumatism as a disability, and his failure, also, to furnish the Department any evidence of its existence during his life-time, raise a presumption that that disease did not exist in the service, and did not result therefrom. This presumption is so strong in the opinion of the Department that it is not overcome or outweighed by the testimony of claimant's officers, comrades, and neighbors, who testify to the existence of rheumatism while in the service and immediately subsequent thereto. This testimony was furnished years subsequent to the alleged existence of rheumatism, and is unsupported by either record or medical evidence. (See the case of Ruth L. Miller, 2 Pension Decisions, p. 214, and cases therein cited.)

The cause of death presents a purely medical question, and it is the settled practice of the Department to be guided in the determination of such questions by the opinion of the medical referee. (Lucinda Gaskell, 1 Pension Decisions, p. 29; Patrick Preston, *ibid.*, p. 41; John Douglass, *ibid.*, p. 52; William H. Garrison, *ibid.*, p. 262; Joseph L. Faulkner, *ibid.*, p. 292; Uriah W. Romine, *ibid.*, p. 299; Levi Reeves, 2 Pension Decisions, p. 177, and cases therein cited.)

In accordance with the rule announced in the foregoing cases, the action of your office is affirmed, and the papers accompanying your letter of transmittal of October 26, 1888, are herewith returned.

CERTIFICATE OF DISABILITY—PENSIONABLE CAUSE.

ALBERT T. CHAPIN.

1. Neither *ex parte* testimony contained in the affidavit of claimant nor the evidence of comrades relating to the incurrence of an alleged disability can be accepted as sufficient to overcome the statements embraced in the certificate of disability upon which the soldier was discharged, inasmuch as such statements are deemed conclusive evidence of the facts set forth, unless either fraud or mistake be apparent upon the face of the certificate itself, or be otherwise clearly established by competent evidence.

2. The Department holds that disabilities from disease or from injuries, to be pensionable, must be of such a character and exist to such a degree as to be liable to detection by examining surgeons whose official duty it is to ascertain the facts after careful examination and report them to the Bureau of Pensions.

Assistant Secretary Hawkins to the Commissioner of Pensions, September 5, 1888.

I have considered the appeal of Albert T. Chapin, late corporal of Company H, Twenty-seventh Massachusetts Volunteers (No. 119,411), of August 14, 1888, from your office decision of June 20, 1884, rejecting his application for invalid pension on the ground of "no record, and failure of claimant to prove origin of alleged diarrhea and rheumatism in the service."

The substance of the ground of appeal is that your decision is not warranted by the testimony in the case.

Soldier enlisted October 1, 1861, was mustered as corporal November 1, 1861, and discharged on surgeon's certificate of disability, May 20, 1862, which contains the following certificate from the captain commanding the company and the regimental surgeon, namely:

Capt. Charles D. Sanford, commanding the company, says: "He has been unfit for duty and continuously complaining for several months. Up to the 1st of November, 1861, he discharged his duties fairly, but since then has acted as if completely broken down, but has not succeeded in convincing his surgeon or captain of it. He is discharged for utter worthlessness as a soldier."

George A. Otis, regimental surgeon, certifies as follows:

I have examined the said Albert T. Chapin and find him incapable of performing the duties of a soldier because of symptoms ascribed by him to a blow on the left side some two years ago. When mustered in, he denied having received any injury; he was apparently well then. Since November, 1861, he has been almost constantly on the sick report; when returned to duty, he declares with tears that he is incapable of work. I am utterly incredulous as to the pain in the side, but the man has done no service for six months, and he is a source of infinite annoyance.

Claimant filed his original declaration May 28, 1866, in which he alleges that he contracted internal piles brought on by a severe attack of diarrhea in March and April, 1862. In a declaration, filed December 13, 1879, he alleges that he contracted rheumatism in his back and legs by exposure in the fall of 1861, and that he contracted chronic diarrhea by exposure and improper diet in February, 1862.

The claim was rejected after special examination.

The argument of claimant's attorney is, in effect, that the testimony of claimant's officers and comrades establishes the fact that claimant incurred the disabilities as alleged. This testimony, if taken alone, would undoubtedly be sufficient to establish incurrence; but neither your office nor the Department is authorized to decide a case upon the *ex parte* testimony contained in the affidavits of claimants. Other testimony must be considered, and due weight given to all the testimony in arriving at the final conclusion. The evidence furnished by the official registration contained in the surgeon's certificate of disability for dis-

charge is a material part of the testimony in the case, as is also the evidence contained in the reports of the various medical examinations.

The certificate of disability in this case makes no mention of chronic diarrhea, piles, rheumatism, nor, in fact, of any specific disability. The case in this respect comes within a rule of the Department that statements contained in certificates of disability upon which the soldier was discharged from the service are deemed conclusive evidence of the facts therein alleged, unless either fraud or mistake be apparent upon the face of the certificate itself, or is clearly established by conclusive evidence. (See Adam Cutts, 2 Pension Decisions, page 26, and cases therein cited.)

The application of this rule reversed the action of your office in the cases of William H. H. Stone (1 Pension Decisions, page 182); Anson Howe (*ib.*, page 198); Thomas H. McCreary (*ib.*, page 275), citing and affirming the case of Isaac Williamson (1 Pension Decisions, page 7).

A certificate of disability for discharge is the expert, medical official registration of an existing fact, required by law to be made, and made in compliance with law and in the line of official duty. (See paragraphs 245, 246, and 247, U. S. Army Regulations (1881), pages 30 and 31; 1st Greenleaf on Evidence, paragraph 493. See cases of Henry Halsted, decided by the Department September 6, 1888, 2 Pension Decisions, page 221; James Boyle, 1 Pension Decisions, page 149; Benjamin Tutt, *ib.*, 412.)

Referring to the *ex parte* testimony filed by claimant, while it is true that Captain McKay, of claimant's company, testified that claimant contracted rheumatism in back and legs in the fall of 1861, caused by exposure, that in February, 1862, he contracted chronic diarrhea, caused by exposure and improper diet, and that this testimony is substantially corroborated by Comrades Charles T. Evans, W. T. Terry, Henry M. Day, Herbert S. Johnson, and Lieut. Jerome B. Joslin, yet, the testimony of Terry and Evans is modified by the testimony taken before Special Examiner; and reference to Comrade Day's affidavit illustrates the uncertain character of this class of testimony. He testifies to the condition of claimant in the service in 1863, whereas claimant was never in the service subsequent to May, 1862. These affidavits, too, are executed from eighteen to twenty-five years subsequent to the event about which deponents testify. There is a strong degree of uncertainty in this class of testimony, in comparison with which the record evidence is much stronger. It is very natural that the mind of witnesses should become obscure by the lapse of time, while the record, on the contrary, is thereby unaffected.

It is unnecessary to discuss the adverse testimony brought out on special examination, as the result of the medical examinations shows that the claimant is not disabled in a pensionable degree, regardless of the fact as to whether he did or did not incur his alleged disabilities in the service.

Claimant has had four medical examinations, in none of which is he corded any rating. He was first examined November 23, 1866, at orthampton, Mass., by Dr. Samuel A. Fiske, examining surgeon, who rtifies that, in his opinion, claimant is not incapacitated by piles and eumatism for obtaining his subsistence by manual labor. He further rtifies:

The applicant alleges that he has piles and rheumatism induced by his service in e Army. He enlisted in September, 1861, was discharged May 22, 1862, by reason his worthlessness as a soldier, according to his discharge. There is no physical on of his suffering from either piles or rheumatism.

Claimant was next examined June 2, 1880, at New Haven, Conn., by octors Anderson and Bissell, examining surgeons, who certify as llows:

Claimant's symptoms are purely subjective; physical examination fails to detect e slightest tendency to rheumatism. Tongue normal and clean; joints appear ver to have had arthritic inflammation. According to claimant's story he enjoys the average good health, has a good appetite, sleeps well, and every appearance him good. No rating.

The third examination of claimant was at the same place (New Haven) ugust 4, 1880, before a full board, who certify:

Claimant is spare; muscular tissue fairly developed; tongue clean; papillæ slightly ivated; symptoms purely subjective. No rating.

Claimant was again examined by a medical board at Hartford, Conn., ay 24, 1882, who report as follows:

We find no evidence of disability from chronic diarrhea nor rheumatism. He does t appear to be strong. No rating.

To entitle a claimant to a pension his disabilities must be such as to able the examining surgeons to discover it. The Department uniformly holds that "disabilities from disease or injuries, to be pensionable, must be of such a character and exist to such a degree that they n be detected by examining surgeons whose official duty it is to ascertain the facts after careful examination and report them to the Pension Office". (See cases of Daniel Bower, 1 Pension Decisions, page 257; muel R. Scott, *Ib.*, 67.)

Your decision is in harmony with the rules of the Department and as justified by the evidence in the case. It is accordingly affirmed. ie papers in the case accompanying your letter of transmittal of September 24, 1888, are herewith returned.

ATTORNEY'S FEE—RIGHTFUL ATTORNEY.

C. D. PENNEBAKER, JR., ATTORNEY.

Where an attorney filed a declaration for widow's pension under the act of January 29, 1887, but said declaration was executed April 20, 1886, nearly nine months before the passage of the aforesaid act, the Department holds that such a declaration, for lack of validity, can not confer upon claimant nor upon said attorney any right under said act, although it appears that said declaration was not filed until *after* the passage of the act itself.

2. The evidence necessary to obtain pension under the act of January 29, 1887, must be presented in accordance with such rules or regulations as the Secretary of the Interior may prescribe under said act; but if, at the time (April 20, 1886) the declaration of claimant was executed, no such rules or regulations had been prescribed, then the claimant could not derive any benefit, under said act, from said informal declaration, nor could the person who filed it be properly recognized by the Commissioner of Pensions as claimant's attorney, and entitled to a fee.
3. The declaration of claimant, executed and filed subsequent to the passage of the act of January 29, 1887, in accordance with the rules and regulations prescribed under the act by the Secretary of the Interior, is accepted by the Department as the instrument that lawfully carries with it the attorney's fee, and the attorney who files such declaration is alone entitled to recognition by the Commissioner of Pensions as the rightful attorney in the claim.

Assistant Secretary Hawkins to the Commissioner of Pensions, October 12, 1888.

Herewith are returned the papers which accompanied your report of October 5, 1888, upon the appeal of C. D. Pennebaker, jr., attorney, of Washington City, D. C., from your action refusing to certify to C. D. Pennebaker & Sons a fee upon the issue of September 12, 1887, in the service-pension claim, Mexican War, certificate No. 1245, of Helen M. Hayes, widow of Thomas Hayes, late private, Lillard's Company, First Kentucky Volunteers.

On February 11, 1887, a declaration was filed for claimant under the act of January 29, 1887, by which one, A. M. Kennedy, was appointed her attorney. Said declaration was executed by claimant on the 20th of April, 1886.

On the 25th of February, 1887, C. D. Pennebaker & Sons, as attorneys for claimant, filed another declaration for pension under said act, said declaration being executed by claimant on the 14th day of February, 1887.

A certificate was issued to claimant September 12, 1887, granting her a pension as the widow of the soldier, under said act, and said Kennedy was recognized as attorney for claimant upon said issue, and allowed and paid a fee of $10.

From said action the appellant, as the survivor of and the successor to the firm of C. D. Pennebaker & Sons, appeals, September 21, 1888, contending that the declaration filed by said Kennedy for claimant was not executed under the act of January 29, 1887, was informal, and could not confer any benefit upon the claimant, nor upon said Kennedy as her attorney; that he was not entitled to recognition therefor, and that they (C. D. Pennebaker & Sons) had filed the only formal and properly executed declaration under said act for claimant, as well as all the evidence upon which said claim was allowed; and that they should have been recognized as attorneys in the case and paid the fee therein, and praying that the action of the Commissioner of Pensions be reversed, and said Kennedy required to refund said fee, unlawfully paid to him, *and that the same* be ordered to be certified and paid to them.

The only question to be determined in this case is whether or not the declaration filed by said Kennedy upon the 11th of February 1887, was sufficient to entitle him to recognition as the attorney of the claimant; if so, your action was correct; if not, the position of appellant is well taken. The declaration filed by said Kennedy purports to be a declaration under the act of January 29, 1887, claiming a pension thereunder for the widow of a soldier in the Mexican war; but said declaration was executed by the claimant on April 20, 1886, nearly nine months before the act creating a right to the pension was passed, and before the claimant could make any claim therefor. The Department is clearly of the opinion that a declaration thus executed could not confer upon the claimant, nor upon her attorney, any rights under said act, and that this objection is not removed by the fact that it was retained, and not filed, until after the passage of said act.

A moment's consideration will make this very clear. Said act requires in its third section that the proof necessary to obtain pension thereunder shall be made under such rules and regulations as the Secretary of the Interior may prescribe. At the time this declaration was executed by claimant there could have been no such rules and regulations prescribed, nor in existence, for the reason that the act itself was not in existence, and there was no such thing as a service pension to widows of soldiers of the Mexican war.

Again, said declaration can only show, and in fact does not purport to show more than, that the claimant was living and unmarried upon the 20th of April, 1886, nearly nine months before said declaration was filed, whereas, under said act, these facts must appear affirmatively in the declaration subsequent to the date of the passage of the act.

But, more than this, it appears upon the face of said declaration that the claimant was only fifty-eight years of age at the time that she executed it, and not within the age of those who are entitled to the benefits of said act, solely by virtue of the service of the soldier, but, being less than sixty-two years of age, it was necessary for her to show dependence equivalent to that prescribed and recognized by the general pension laws, in order to obtain her pension thereunder. No such allegation appears in said declaration.

In other words, it does not state upon its face sufficient facts to entitle the claimant to pension under said act; and it has long been a rule of the Department as well as of your Bureau, that while claimants for pension will not be held to strict and technical rules of pleading, yet, in order to constitute a valid claim for pension, the declaration must state facts sufficient to constitute a valid claim upon which pension would be granted, if proved. (See case of Gittens, Amanda, 1 P. D., page 54.)

If the claimant could derive no benefit under said act from said declaration, most assuredly her attorney could not. The declaration filed by C. D. Pennebaker & Sons, February 25, 1887, was properly exe-

cuted by the claimant subsequent to the passage of the said act, and contained all the allegations and statements necessary to establish her claim for pension thereunder; and the whole of the subsequent evidence filed in said claim, and necessary to its favorable adjudication, appears to have been obtained and filed by C. D. Pennebaker & Sons.

The Department is, therefore, of the opinion that your action recognizing said Kennedy as the lawful attorney of the claimant, under the written instrument purporting to be a declaration, filed by him February 11, 1887, was erroneous, that said C. D. Pennebaker & Sons should have been recognized as the attorneys of claimant, and should have been paid the fee certified by you to said Kennedy.

Your said action is, therefore, reversed and you are hereby directed to take the necessary steps to recover from said Kennedy the fee thus wrongfully paid him, and to certify and pay the same to the appellant as the survivor and successor of said firm of C. D. Pennebaker & Sons.

INSURANCE POLICY—ORIGIN OF DISABILITY.

MARY E. LIVEZEY, WIDOW.

Where, years subsequent to his discharge from the service, deceased soldier was insured upon his life after careful medical examination, the policy of insurance is accepted as competent and conclusive evidence of soundness at the date of said examination; and the allegation in the widow's declaration, unsustained by either record or medical evidence, that soldier died of *disease of lungs* and of *rheumatism* contracted in and by reason of the service is not sufficient to overcome the presumption that the cause of death was incurred subsequent to discharge, and subsequent, also, to the date of the aforesaid policy of insurance.

Assistant Secretary Hawkins to the Commissioner of Pensions, November 21, 1888.

Herewith are returned the papers which accompanied your report of November 13, 1888, upon the appeals of George H. Livezey, deceased, late private of Company G, Eighty-fourth Indiana Volunteers, No. 376,069, and Mary E. Livezey, widow, No. 292,393.

The decedent filed his declaration for pension June 14, 1880, alleging that he contracted rheumatism about September, 1862. He died December 4, 1881, prior to the adjudication of his claim.

The widow, appellant, filed her declaration May 5, 1882, alleging that her husband contracted in the service diseases of liver and rheumatism of which he died.

The soldier enlisted August 15, 1862, was present to February, 1863, detached to Pioneer Corps and so reported to June 30, 1864, and transferred to Engineer Brigade July 25, 1864. He is reported present throughout service, and discharged June 30, 1865.

The records furnish no evidence of disability alleged to have been contracted in 1862.

The claim of decedent was rejected by your office December 27, 1884, upon the ground that soldier's diary, submitted as evidence, shows conclusively that he contracted no permanent disability in the service.

The claim of widow, appellant, was also rejected by your office, at the same date, upon the ground that death of soldier was not due to his military service. Subsequently the claims appear to have been reopened by your office, and, on the 13th day of February, 1885, both claims were referred for special examination, to determine, accurately, the physical condition of decedent subsequent to his discharge from service, and the direct and immediate cause of death—resulting from which examination the claims were finally rejected, April 12, 1887, upon the ground that "origin of rheumatism in service is not shown, and the evidence elicited by a careful special examination fails to afford a reasonable presumption that death was due to any disease contracted in the service. No material evidence has been filed since rejection."

From this adverse action of your office, appeal is taken.

The widow, appellant, alleges that her husband died from the effects of rheumatism and liver disease, contracted in the line of duty in the military service of the United States.

It appears that appellant's husband was insured about four months prior to his death, in the Equitable Life Insurance Company of Iowa, from which company the appellant received $1,000 at her husband's death. As will be seem by reference to the deposition of Cyrus Kirk, assistant secretary of said company, the deceased soldier was insured on the 26th day of July, 1881, and died on the 4th day of December, 1881. At the time of insurance, on the 26th day of July aforesaid, the appellant's husband declared, over his own signature, that he was in perfect health, and particularly free from rheumatism, consumption, disease of the heart, and liver complaint. According to his own statement he was in perfect, robust health about five months prior to his death. The soldier, in his declaration for insurance, July 26, 1881, further stated that he was then insured in the Mutual Benefit Insurance Company of Des Moines, Iowa, for $2,000. It appears this company "bursted up" in 1883 or 1884, and its officers decamped. As the soldier died two or three years prior to the collapse of this company, his widow, appellant, no doubt collected the $2,000 of insurance.

Dr. Seth Knowles, the physician who attended the soldier at his death, and afterwards made a *post-mortem* examination to determine cause of death, also examined the soldier for the insurance company in July, 1881. In a letter to the said Equitable Life insurance company, dated December 26, 1881, this doctor says:

I have known Mr. Livezey for nearly four years and have always considered him a healthy man. I examined him for insurance some time in the spring, and at that time had no reason to change my opinion. He began to fail probably in August, but I was not called upon for any advice or treatment until about three weeks preceding his death, when I told him he could not reasonably expect to see the holidays; and I then gave it, as my opinion, that his trouble was [from] the liver and kidneys. The

day before his death I chanced to be in his town, when I was again sent for, but considered his case beyond human reach; he died next morning. Owing to the great diversity of opinion in the town regarding his case, I requested and obtained a *post mortem*, which confirmed my previously expressed opinion, with this addition: I found the right lung the seat of deposit of a considerable amount of tubercle, which, during his illness, I had not supposed to exist, and which certainly did not, at the time of his examination for insurance, as his lungs gave the most perfect resonance. But from the enlargement of the liver and its consequent encroachment upon the lung, I should say that the liver was at the bottom of it all. I have made a great many *post-mortem* examinations, and have met with some cases which in the main were nearly identical with this, upon which ground I base my report made to you. Should you desire, I can cite you to ample authority for my opinion.

This letter throws light into this case, and, in my opinion, determines the cause of death—at least, the cause of death therein assigned is a matter of record, and has been accepted by the insurance company and insurance paid thereon.

Dr. Knowles, in his letter to the insurance company, mentions incidentally that he "examined him for insurance some time in the spring." This was no doubt the time the soldier was insured in the Mutual Benefit Company.

The history of this case seems to be thoroughly shaded with doubt and contradiction. Either the two insurance companies were defrauded out of $3,000 the year the soldier died, or an attempt is now being made to obtain a pension by false and fraudulent representations. In other words, if the soldier was sound in the early part of 1881, when he was insured, then the allegation that he was suffering from disabilities incurred in the service is false.

Dr. Knowles, in the vicinity where he resided in 1881, is spoken of as quite reliable, and it was on his representations that the Equitable Insurance Company insured the deceased soldier. If his representations to the company in 1881 are to be relied upon, then, there is no merit whatever in the case.

From a careful consideration of all the evidence in this case, including the soldier's diary and his declarations to the Equitable Life Insurance Company, I have arrived at the conclusion that the soldier did not contract rheumatism while in the military servic eof the United States or that his death was due to any disease contracted in the service.

Your action rejecting the claims on the grounds stated in your report herein is affirmed.

BEGINNING OF PENSION—SPECIAL ACT.

REBECCA, WIDOW OF JOHN E. ALLEN.

1. The Department re-affirms the ruling in the case of Alvin Walker (Pension Decisions, vol. 1, p. 143) to the effect that "in cases where claimants obtain relief through a special act of Congress, the Commissioner has no discretion and is required to begin the payment of the pension at the date of the passage and approval of said act, unless the act itself shall specify some other date by which the Commissioner shall be guided."

2. The genius of our institutions and the policy of our laws tend to limit, so far as it can conveniently be done, all discretion on the part of executive officers in drawing money from the public Treasury; and when the law-making power has, by a special act, granted a pension to a particular person, the presumption is that the act measures the full bounty intended to be conferred on that person by way of pension and that no additional amount whatever should be granted him under the general laws, unless expressly provided for under and by special act. (Edwin E. Tucker, P. D., vol. 1, p. 1.)

Assistant Secretary Hawkins to the Commissioner of Pensions, October 11, 1888.

I have considered the appeal of Rebecca Allen, widow of John E. Allen, deceased, late landsman, U. S. S. *Atlanta*, U. S. Navy (certificate No. 3402), from your action of July 14, 1886, dating the commencement of her pension June 24, 1886, the date of the approval of the special act of Congress which authorizes your office to issue the certificate.

You state in your report to the Department in this case, under date of September 24, 1888, that "a certificate No. 3402, was issued on July 14, 1886, in favor of appellant at $12 per month, commencing June 24, 1886, and $2 per month additional for the minor child, in accordance with a special act approved June 24, 1886, as follows, to wit:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, directed to place on the pension roll, subject to the provisions and limitations of the pension laws, the name of Rebecca Allen, widow of John E. Allen, deceased, late a landsman of the United States steamer *Atlanta*, approved June 24, 1886.

Appellant contends in her appeal that pension should commence from date of soldier's death, and not from date of the act.

In view of appellant having gone to Congress and by that authority having had her claim determined and the date of commencement of the pension specifically fixed, the jurisdiction of this Bureau so far as it relates to any action which would affect the date of commencement has been removed.

The appeal presented by claimant is rather in the nature of a petition than an assignment of error; but the substance of the alleged error would seem to be embraced in the fourth subdivision of the petition, which states that "subsequent to said rejection a bill was introduced in the houses of Congress for her relief, and, as proof that the honorable Senators and Representatives believed in the merits of her claim and were satisfied with the proofs thereof, her bill was passed." She then alleged that the bill only granted her pension from the date of its passage and not from the date of soldier's death.

If it is true, as alleged by claimant, that the proof shows her entitled to pension from the date of the death of her husband, and Congress was governed solely by the proof in the case in granting the pension, then, the error, if any was committed, is with Congress and not with your office. It was the act of Congress which authorizes your office to issue claimant her certificate, and you were authorized to issue a certificate in accordance only with the act. The act is not retroactive in its

effect, but takes effect only from the passage of the act. Section 4720 provides that—

When the rate, commencement, and duration of a pension allowed by special act are fixed by such act, they shall not be subject to be varied by the provisions and limitations of the general pension law; but, when not thus fixed, the rate and continuance of the pension shall be subject to variation in accordance with the general laws, and its commencement shall date from the passage of the special act, and the Commissioner of Pensions shall, upon satisfactory evidence that fraud was perpetrated in obtaining such special act, suspend payment thereupon until the propriety of repealing the same can be considered by Congress. (See appendix, page 14, 1st Pension Decisions.)

In an act to equalize pensions in certain cases, approved June 6, 1874, it is provided—

That all persons entitled to pensions under special acts fixing the rate of such pensions, and now receiving or entitled to receive a less pension than that allowed by the general pension laws under like circumstances, are, in lieu of their present rate of pension, hereby declared to be entitled to the benefits and subject to the limitations of the general pension laws, entitled "An act to revise, consolidate, and amend the laws relating to pensions," approved March 3, 1873, and that this act go into effect from and after its passage: *Provided*, That this act shall not be construed to reduce any pension granted by special act. (See appendix, p. 35, 1st P. D.)

In the appropriation act approved July 25, 1882, it was enacted—

That no person who is now receiving or shall hereafter receive a pension under a special act shall be entitled to receive in addition thereto a pension under the general law, unless the special act expressly states that the pension granted thereby is in addition to the pension which said person is entitled to receive under the general law. (See Appendix, p. 50, 1st P. D.)

It was contended by the Hon. Benjamin F. Butler, in the case of Alvin Walker, decided by the Department April 29, 1887, that, inasmuch as the special act designates no date at which the pension shall begin, the pensioner is entitled to the benefit of "the provisions and limitations" of the general pension laws. In deciding the case, the Department used the following language:

In cases where claimants obtain relief through a special act of Congress, the Commissioner has no discretion, and is required to begin the payment of the pension at the date of the passage and approval of said act, unless the act itself shall specify some other date by which the Commissioner shall be guided. (See 1 P. D., p. 143.)

It was further stated by the Department in said case last above cited that—

When a claimant seeks relief at the hands of Congress, he thereby virtually agrees to abide by the action of that body in determining the merits of his claim for pension, and he agrees, furthermore, that, in case he be granted a pension, the payment of the same shall begin at the date of the passage and approval of the special act, unless the act itself specifically designates some other date. (See *ibid.*, p. 146.)

In the case of Edwin E. Tucker, decided by the Department February 6, 1886, where the same question was involved, the Department said:

The genius of our institutions and the policy of our laws tend to limit, so far as it can conveniently be done, all discretion on the part of executive officers in drawing money from the public Treasury; and when the law-making power has, by a special

act, granted a pension to a particular person, the presumption is that the act measures the full bounty intended to be conferred on that person by way of pension, and that no additional amount whatever should be granted him under the general law, unless expressly provided for under and by special act.

The Tucker case was cited and re-affirmed in the case of James Long. (1 Pension Decisions, p. 423; see, also, the case of James H. Young, *ibid.*, p. 445.)

This case is not affected by the provisions of the act approved June 7, 1888, granting pensions to widows to commence from the date of the death of the husband, as that act applies only to pensions "granted under the general laws." The remedy, if any, in this class of cases rests alone with Congress.

The action of your office in this case in dating the commencement of the widow's pension from and including the date of the special act was in strict accordance with the law and the departmental decisions, and is accordingly affirmed. The papers accompanying your letter of transmittal of September 28, 1888, are herewith returned.

DUE ENLISTMENT—MEXICAN WAR.

FLORIDA, WIDOW OF PIERRE M. KENNERLY.

The act of January 29, 1887, granting service pensions to the "surviving officers and enlisted men" of the war with Mexico, distinctly states and explicitly requires that those claiming its benefits must have been duly enlisted in and honorably discharged from the service in said war; and the expression, "duly enlisted," is held to mean a regular legal enlistment, such as is authorized by military rule and precedent.

Assistant Secretary Hawkins to the Commissioner of Pensions, September 5, 1888.

Herewith are returned the papers which accompanied your report of August 25, 1888, upon the appeal of Florida Kennerly, widow of Pierre M. Kennerly, deceased, late private in Captain McKinstry's Company, Mexican War Volunteers, from your action rejecting her application for restoration to the pension-rolls.

Claimant filed her original declaration for pension, August 27, 1887, alleging, as the basis of her claim, that her husband enlisted in a company commanded by Capt. Justus McKinstry, acting quartermaster, in the valley of Mexico, about August 18, 1847; that he was enrolled with other civilians and quartermasters' employés by a military order; that she is forty-nine years of age, and claims a pension under the act of June 29, 1887, by reason of dependence. Her claim was allowed September 19, 1887, and a pension granted her under said act at $8 per month from January 29, 1887, the date of its approval.

On April 11, 1888, the claimant was notified that it appeared from the records of the War Department that the soldier, upon whose account she was drawing a pension, was not duly enlisted in the service of the United States during the war with Mexico, or had not been honorably discharged from said service, and that the payment of her pension would be suspended pending the receipt of satisfactory evidence to rebut the adverse record aforesaid. She was allowed by your office the usual time of sixty days in which to furnish the rebutting evidence required, and, upon her failure so to do within said time, she was, on June 20, 1888, dropped from the roll of pensioners.

From said action she appealed July 16, 1888, contending that it is clearly shown by the evidence on file in her case, and by the official documents referred to therein, that her husband, the soldier, was enlisted in a command which was raised under orders of the general in command of the U. S. Army in Mexico, and performed service in said war as long as required; that these facts should be taken as equivalent to a regular enlistment and honorable discharge; and that she had been granted a bounty land warrant on account of the service of her said deceased husband which, in accordance with the law, should be taken as prima facie evidence of his enlistment, service, and honorable discharge.

OPINION.

The facts presented by the evidence on file in this claim are peculiar, and entitle the appellant to the sympathy of the Department. The records of the War Department furnish no evidence whatever either of the service or of the discharge of the command to which the husband of the appellant belonged; no muster-roll of said company is on file and no returns therefrom. It appears, however, from the evidence on file, that the soldier was enrolled as a private in a company of irregular cavalry, which was raised for temporary service in Mexico under the following circumstances: Upon the advance of the Army of the United States, commanded by General Winfield Scott, into the valley of Mexico, and immediately preceding the series of battles resulting in the capture of the City of Mexico and terminating active hostilities in the Mexican War, on or about the 15th of August, 1847, a number of civilians accompanying the U. S. Army, consisting of quartermasters' clerks and other civilian employés, sutlers, and other camp followers, volunteered their services as a company of cavalry to serve during the then existing military crisis and pending the approaching contest of arms before and at the City of Mexico, their length of service to be determined by the duration of said crisis. The husband of appellant was a sutler accompanying the Army and was among the number of those volunteering as aforesaid. Their services were accepted by the commanding general, and Capt. Justus McKinstry, of the regular Army, was detailed to command said company by the following order, which

is found upon page 40 of the appendix to Senate Executive Documents, Vol. I, 1847–1848, Thirtieth Congress, first session:

HEADQUARTERS OF THE U. S. ARMY,
INSPECTOR-GENERAL'S DEPARTMENT,
Chalco, Mexico, August 15, 1847.

Capt. Justus McKinstry, of the U. S. Army, is hereby excused from duty in the quartermaster's department, to which he belongs, and, at his own request, is recognized as the commander of a body of volunteers, citizens of the United States, to be known as the "McKinstry Volunteers," who, under the influence of a noble patriotism, have enrolled themselves for service in the U. S. Army, pending the approaching contest of arms before and at the capital of the Mexican Republic.

He will be obeyed and respected accordingly.

By command of Maj. Gen. Winfield Scott.

E. A. HITCHCOCK,
Lieutenant-Colonel, Acting Inspector-General.

It appears from the report of Captain McKinstry, found on the same page and in the volume just referred to, and also from the report of Col. William S. Harney, commanding cavalry brigade, found in same volume on page 346, that said company performed active service and participated with great gallantry in the battles of Contreras and Churubusco, and in the storming and capture of the City of Mexico. The soldiers of said command are complimented in the highest manner for their bravery, discipline, and service by Captain McKinstry in the report above referred to. It appears further that, upon the capture of the City of Mexico, said company was disbanded and the men composing it returned to their former occupations and employments. The fact that the husband of this appellant was a member of said company and performed gallant service in several battles during the Mexican war is undisputed; the fact of her dependence upon her father and son for support is also clearly shown; and the only fact adverse to her application for restoration to the pension-rolls arises from the nature of the enrollment and the character of the command of which her husband was a member, as above set forth. The act of January 29, 1887, is explicit in its terms, and more stringent in its requirements than most of the acts granting pension. It distinctly states that those entitled to its benefits for service during the war with Mexico must have been "duly enlisted" and must also have been "honorably discharged" from the service in said war. The words "duly enlisted" can have but one signification and necessarily mean a regular, legal enlistment, such as is authorized by law and recognized by military rule and precedent; and the words "honorably discharged," as used in said statute, must be taken, not in contradistinction altogether to dishonorable discharge, but as meaning a regular and legal discharge from the service, such as is accorded to those who have been duly and regularly enlisted, upon the conclusion of their term of service.

It is evident from what has been stated with regard to the formation of this command that they were not "duly enlisted" in the sense in

which that term is used in said act. It is not absolutely necessary that a soldier be enlisted by a regular recruiting officer in order to be "duly enlisted," but the enlistment must be in pursuance of some law authorizing the raising of troops, and in some command whose formation is legally provided for and called into existence, in order to meet the requirements of the statute.

It is unquestionably within the jurisdiction and power of a commander-in-chief of the Army in time of war and in the face of the enemy and during the existence of a military crisis, to call into service temporarily any civilians or citizens of his country within his lines pending the existence of such crisis; and, during the said time, said civilians would be subject to military discipline, but they do not thus become a part of the military forces of the country, nor can they be held in such service for a longer period than the crisis which called them forth; nor can such persons be said to be, nor have they ever been held to be, "duly enlisted."

That the above is the correct view is clearly shown in this instance by the language of the report, above referred to, of the commander of said company himself, who states therein as follows:

> As those composing my command *were not regularly mustered into the service of the United States*, and are, perhaps, not entitled to the rewards which a beneficent government bestows upon those who suffer in the service of their country, I can not too strongly commend to the consideration of the general-in-chief the case of Mr. ——— Dresser, who lost his leg in the discharge of his duty.

Immediately after the capture of the City of Mexico, said company appears to have been disbanded by its captain without further ceremony, as has been hereinbefore stated. The Department does not intend to intimate that this was in any sense a dishonorable discharge from the service in which they had been engaged, but holds that it was not an "honorable discharge" in the technical and legal sense in which those words are used in said act.

For the above reasons the Department is reluctantly forced to the conclusion that the members of said company were not "duly enlisted" into the military service of the United States in the Mexican war, nor "honorably discharged" from said service, in the sense in which those terms are used in the act of January 29, 1887, nor would they be entitled to pension thereunder; and consequently your action in dropping the appellant from the rolls was correct.

The Department would add, however, that, from the unquestionable evidence of the gallant and meritorious service rendered by the members of said command, and among them the husband of this appellant, in said war, this claim affords a most meritorious and commendable case for Congressional action; and I suggest to you the advisability of recommending the claimant for favorable Congressional action in accordance with the provisions of the joint resolution approved May 29, 1830,

as the Department is fully convinced that the survivors of said command and the widows of those who have died should be entitled to the benefits provided for by the act of January 29, 1887, although the language of said act precludes either the Department or your Bureau from extending the same to them.

For the above reasons your action herein is affirmed.

PRIOR SOUNDNESS—RESTORATION.

WILLIAM J. BROOKS.

Where a pensioner is dropped from the rolls by reason of statements which were subsequently disproved by a special examination, the pensioner should be restored to the rolls; and it is held that, where a pensioner was dropped from the rolls for alleged unsoundness prior to enlistment, but a medical record appears showing the incurrence in the service of the disability for which pensioned, and, furthermore, a record showing that the soldier performed three years of active service before the development of said disability, he having been accepted as sound at both a first and a second enlistment, these facts render the presumption of soundness prior to enlistment equivalent to conclusive evidence of the fact.

Assistant Secretary Hawkins to the Commissioner of Pensions, November 22, 1888.

Herewith are returned the papers which accompanied your report of October 19, 1888, upon the appeal of William J. Brooks, late private, Company F, First New York Light Artillery, from your action rejecting his application for restoration to the pension rolls.

Claimant was a pensioner at the rate of $12 per month for an indolent ulcer of the left leg. After a special investigation of his case, he was dropped from the rolls on May 18, 1888, upon the ground that the disability for which he was pensioned originated prior to his enlistment. From said action he appealed September 1, 1888, contending that the evidence on file in his claim clearly establishes that his disability had no existence at the date of enlistment, but was incurred in the service and line of duty, and praying to be restored to the pension rolls.

OPINION.

It appears from the record in this claim that the evidence upon which was based your action dropping appellant from the pension rolls is contained in the statements and deposition of one Pierce, who was a comrade of appellant in the service, and a sergeant of his company. The charges made by this witness are, substantially, that the sore or ulcer upon appellant's leg, for which he was pensioned, existed long *prior* to his enlistment in the Army, and that its reappearance during his service

was reported at the time to have been brought about by the appellant himself for the purpose of procuring his discharge; and he mentions the names of several persons to whom the appellant had spoken of the existence of said disability prior to the date of his enlistment, and, also, that he had been told by a physician, one Dr. Leonard, who had treated appellant's leg shortly after his discharge, that the sore looked like it had been aggravated by having a copper cent bound on it, and that appellant had told him (Leonard) that he could open and heal up said sore at pleasure. This witness exhibited unmistakable evidences of unfriendly feeling toward the appellant, upon his examination, and frankly admitted that a state of enmity existed between them.

Subsequently, the claim was subjected to a thorough special examination, with a view to ascertaining the truth of the charges alleged by the aforesaid witness, and the depositions of a number of persons, including the members of the two families with whom the appellant had resided from infancy up to the date of his enlistment, were obtained. These witnesses wholly fail to sustain or to corroborate the statements made by said Pierce, the only evidence elicited tending to show the existence of the disability prior to his enlistment being that some years before the war, while residing in the family of one Herman Smith, the appellant was afflicted with boils upon one of his legs, one of which was of a very malignant character; and, having been bruised or injured, and being situated near one of the veins in appellant's leg, became quite sore and bled a good deal at the time, but was completely healed up, and does not appear to have afterwards inconvenienced him or to have left any results.

This evidence, furthermore, wholly fails to locate said boils either upon the same leg or at the same place at which the ulcer is located, and for which he was pensioned. The persons mentioned by said Pierce as those to whom the appellant admitted the existence of an ulcer or sore upon his left leg prior to his enlistment deny fully and completely the truth of said statements, and emphatically allege that appellant never at any time had such conversation with them, or that they ever knew of the existence of such a disability prior to his enlistment. The physician, also mentioned by said Pierce in his deposition before the special examiner, denies ever having had such a conversation with said witness, or ever having made the statements credited to him, and furthermore states that he knew of no circumstances in connection with appellant's disability which would justify them.

The appellant accounts for the incurrence of his disability during his military service by stating that he suffered more or less for several years with chronic diarrhea while in the service, and that upon suddenly checking said disease, about May, 1864, he again suffered from boils on his legs, and that one on his left leg broke and left the sore or ulcer for which he was pensioned.

This statement raising a medical question, the claim was, during its investigation by your office, referred, on May 16, 1887, to the medical referee of your Bureau "with the request that he state whether in his opinion soldier's present condition from ulcer is due to his military service or to the condition of the soldier's system prior to enlistment." The medical referee, after having given due consideration to all the evidence in the claim, replied to said request in an opinion of May 23, 1887, as follows:

From a medical stand-point, this case evidently has quite a different appearance from that which, judging from the opinions expressed in the case, it presents in its legal aspects. I do not think there is anything in the evidence on file which establishes a pre-existing ulceration of the leg of any severe character. It must be evident that there was no disease of leg at the time of soldier's muster into the service. Whether or not there was *varix* we are unable to determine. We have positive proof of ulcer in service and since, due to varicose ulceration, and I am of opinion that *it was due to his military service* and not to any special condition existing prior to enlistment.

The records of the War Department show that appellant enlisted October 4, 1861, and that he was present for duty with his command up to January 24, 1864, when he re-enlisted as a veteran volunteer, and is reported present for duty up to October, 1864. He entered the post hospital at Fort Ward, Va., October 26, 1864, with a sore leg; post hospital, at Fort William, Va., December 10 of the same year, with a chronic ulcer, and Mount Pleasant Hospital, District of Columbia, on the 27th of said month with an indolent ulcer of the left leg, and he was mustered out of service with his company June 7, 1865.

It is thus shown by the record that appellant performed three years of active service in the Army prior to the appearance of the disability for which he was pensioned, and that he was accepted as sound, not only upon his first enlistment, but upon his re-enlistment as a veteran volunteer, which renders the presumption of his prior soundness so strong that, under the rulings of this Department, it can be overcome only by positive and conclusive evidence of prior unsoundness.

The origin in the service of the disability for which appellant was pensioned is testified to positively by the captain of his company and by several of his comrades, and its existence and treatment therefor are conclusively shown by the official record above quoted.

In view of these facts, disclosed by the evidence, and of the conclusive weight which, in accordance with the numerous decisions of this Department, should be given to the hospital record of appellant, and the opinion of the medical referee, above quoted, the Department is clearly of the opinion that the evidence produced in this claim adverse to the appellant is wholly insufficient to warrant dropping him from the rolls. You are therefore requested to restore his name to the pension rolls at such rate of pension as may be commensurate with the severity of his disability, as shown to exist.

WIDOWS' REMARRIAGE—ACT OF MARCH 9, 1878.

ELLEN MORRISON, WIDOW OF DANIEL MILLIKEN. (*Reconsideration.*)

The Department, on a motion for reconsideration, adheres to and re-affirms the decision rendered in this case on appeal April 26, 1888. (P. D., 2d Vol., page 100.)

Assistant Secretary Hawkins to the Commissioner of Pensions, October 8, 1888.

I have considered your communication of July 16, 1888, requesting a reconsideration of the decision of this Department of April 26, 1888, reversing your action rejecting the pension claim No. 44087 of Ellen Morrison, formerly Ellen Milliken, widow of Daniel Milliken, late a soldier of the war of 1812, and resubmitting for my consideration the papers in said claim with a more specific statement of the reasons for your said action of rejection and why you believe that the same should be adhered to.

Said communication also sets forth the grounds of your objection to the conclusions arrived at in said departmental decision, and cites some authorities relied upon by you in support of your position.

In order to a satisfactory understanding of the questions to be discussed and the points of difference arising between your Bureau and the Department, it may be well to briefly recapitulate the important facts in this claim.

The appellant makes application for pension under the act of March 9, 1878, which provides a pension for the "surviving widows" of soldiers of the war of 1812, claiming to be the surviving widow of one Daniel Milliken, who was a soldier in said war. Said Daniel Milliken died, November 3, 1849, and the appellant (his widow) married October 22, 1851, one James Morrison, from whom she was subsequently *divorced*, and who died long prior to the passage of the act of March 9, 1878, under which her claim for pension is made. Said act provides that "the pensions to widows provided for in this act shall cease when they shall marry again." Her claim was, therefore, originally rejected by you upon the ground that, having *remarried* prior to the passage of said act, she was no longer the "surviving widow" of Daniel Milliken, and derived no title to pension thereunder. This action of rejection was reversed by the Department, on appeal, in the decision of April 26, 1888, which held that said act had no retrospective effect, and that the *second* marriage of the appellant, having been dissolved both by divorce and by death, prior to the passage of said act, the claimant was included within its provisions as the "surviving widow" of Daniel Milliken.

Said departmental decision was most carefully considered and appears to the Department to fully answer most of the points raised by you in the present communication.

You state that the said decision "appears to be based upon the assumption that the act of March 9, 1878, is not to be construed to act

retrospectively." Said decision is unquestionably based in large measure upon the theory that said act was not retrospective, but entirely prospective in its nature and in its effects; and to this view the Department most confidently adheres. As was stated fully in said departmental decision, and which can not be successfully controverted, it is an invariable and unquestionable canon of construction that no statute or resolution having the force and effect of law, and which either grants a right upon certain conditions, or deprives certain classes of persons of benefits which they had theretofore enjoyed, shall be construed to act retrospectively upon the persons to whom it is to be applied, unless the intent of the legislature that it shall have such retrospective effect be clearly and unquestionably indicated by the language of the act itself. This is such a plain and fundamental proposition that the Department is at a loss to render it more forcible than its mere statement, and considers it unnecessary to cite, in support thereof, authorities which could be multiplied without limit, and takes for granted that it will be undisputed.

When this rule of construction is applied to the act of March 9, 1878, and especially to the above quoted proviso to the second section of said act, it is clear that there is nothing in said act itself from which a retrospective effect could be inferred. The language is that "the pensions to widows provided for in this act shall cease when they shall marry again;" the future tense is used—the pension "shall cease;" hence, it presupposes that the pension has been granted, and, upon remarriage, the right to receive it is forfeited.

The right to pension is conferred by the act of March 9, 1878, and did not exist before the date of its passage; how, then, could the happening of an event long prior to the date at which the right to pension was created cause it to cease, unless such an event was expressly mentioned in said act? As was clearly pointed out in said departmental decision, said act does not cut off nor forfeit the claim or right to pension which the statute grants to widows, but this subsists during the woman's life, and the Department is still unable to see how it can be affected by the fact that she married a man who died before the act was passed. If the pension be *now* allowed, and she should marry a *third* husband, of course it would cease.

If it be admitted that said act has no retrospective effect, the only question to be decided, and the one most strenuously insisted upon by you, is this: Was the appellant the lawful widow of the soldier at the date of the approval of the act under which she claims? You contend that her widowhood, so far as her first husband is concerned, terminates with her marriage to the second husband, that, at the date of the passage of the said act, she was not the "surviving widow" of Daniel Milliken, and was not embraced within the class of persons described in said act as entitled to its benefits, and that, therefore, her application must be denied. The Department is unable to accede to this view. In

the laws of the States which define and control the rights to property to which a widow is entitled by virtue of her marriage, in the estate of her husband, remarriage has never been held to forfeit any of the rights to which she was entitled as widow of her *first* husband. She takes said property by virtue of her widowhood, and it is no answer to this proposition to hold that, because of the duration and nature of the estate, she does not forfeit it by remarriage inasmuch as her title thereto is derived from her former relation with her first husband, and she takes her share in his estate by reason of her being his *widow* which, upon your view of the law, she would immediately forfeit upon remarriage, because her status as "widow" would be thereby extinguished. You contend that dower, being a life estate and attaching immediately upon the death of the husband, could not be forfeited by remarriage, and therefore, that this illustration is not in point; but the widow, in all of the States, is entitled absolutely to a share of the personality, which does not come into possession until the settlement of the estate, and to which she is entitled solely by virtue of her condition of widowhood; and in no instance has her right to such share of the personal estate of her husband been held to have been forfeited by her remarriage prior to its being paid to her by the personal representatives of her deceased husband. The true point is, that her right to a share in the estate of her first husband grows out of her widowhood, and it is not forfeited by a second marriage by reason of which, if second marriage destroys her status as "widow," as you contend, she could not take. Why, then, should a different rule of construction be applied to an act granting a pension to a "widow" from that which is applied to acts and laws granting to widows rights of property in the estates of their deceased husbands?

The Department has, as yet, been unable to perceive a satisfactory reason for such a difference, and, until it does, must conclude that the same rule of construction should be applied in both instances.

It would appear from the language of all the acts of Congress which have ever been passed granting pensions to widows of soldiers that the fact that widowhood was not destroyed by a second marriage had always been present in the mind of Congress. If, as you contend, the status of widowhood is absolutely destroyed by a second marriage, why would it have been necessary for Congress, in every act passed since the foundation of the Government granting widows a pension, to place in said acts, in specific terms, an inhibition upon the receipt of pension in case of second marriage? These pensions have been granted to widows only, and, if a second marriage destroys the status of widowhood, then they would not be included within the class of persons named as beneficiaries in the acts and would not take thereunder, or, if already pensioned, the pension would cease, they no longer being "widows." Hence, we must conclude that either the various provisions forfeiting the pensions of widows in case of remarriage are mere surplusage, use-

less, and meaningless appendages to said various acts, or that, in the mind of Congress, these persons would, in the absence of said provisions, still be considered the widows of their former husbands and entitled to pension thereunder.

This is illustrated also by the language found in section 7 of the act of July 4, 1864, which you quote in support of your position, and which reads:

And be it further enacted, That, on the remarriage of any widow receiving a pension, such pension shall terminate and shall not be renewed should she again become a widow.

Here it was evidently in the mind of Congress that, in the absence of a provision to the contrary, said pension would be renewed should the persons affected thereby again become widows.

You quote in support of your position an opinion of Attorney-General Butler, of April 7, 1837, in the claim of the widow of Purser Timberlake for half-pay pension, under the act of March 3, 1837. (Mayo and Moulton, p. 427.) In quoting said opinion as authority in this case, it must certainly have escaped your attention that the language of the act under which said claim was made and upon which said decision was rendered was radically different in its terms, not only from the one now under consideration, but from similar acts granting pensions to widows, to which your attention will hereafter be called. Said claim was made under an act entitled "An act for the more equitable administration of the Navy fund," which is expressly retroactive in its terms, providing that the half-pay pension therein granted to the widow of a deceased officer, seaman, or marine, shall commence from the time of the death of such officer, seaman, or marine; and, in case of the death or intermarriage of the widow, shall go to the child or children of such deceased officer, seaman, etc. Here the pension granted to the widow is made to commence from the death of the husband, or from the commencement of her widowhood, and, necessarily, when she takes that pension from said time it is upon the condition therein expressed that she shall not intermarry. The act, by its terms, covers the whole period of widowhood, and the opinion of the Attorney-General thereon was based upon its retrospective operation, as is clearly shown by another opinion of the same officer construing the same act upon another point and found upon the following page of the book above referred to. (Mayo and Moulton, p. 428.)

The said opinion of Attorney-General Butler is, in the view of the Department, clearly in affirmance of the position hereinbefore taken by it, and also in the said departmental decision in this claim; and the Department is under obligations for having its attention called so pointedly to an authority which is so conclusive of the correctness of the position hereinbefore maintained as to the effect which can be given to the language of the act of March 9, 1878.

The last-mentioned act (March 9, 1878) has no line, word, nor syllable

which could be construed as giving it a retrospective effect, but clearly and emphatically states that the pension therein granted is to commence from and after the date of its passage, and that it shall cease if the widow shall marry again. It is impossible to conclude, when you compare the language of these two acts, that the Attorney-General would have construed the last-named act in any other way than has been done by the Department, and the fact that he held that the inhibition against remarriage in the act of March 3, 1837, would deprive the widow of the pension therein granted in case of her marriage before the passage of the act is simply in accordance with the views of this Department, where the act itself is by its express terms retroactive in its operation, and covers the whole time from the death of the husband.

But, furthermore, in support of the position, herein maintained, that the widow of a soldier does not forfeit her right to pension simply by the fact of remarriage alone, let us examine some of the former legislation of Congress upon this subject and see in what position widows of soldiers who have married again are placed by former acts of Congress granting pensions to widows.

In section 3 of the act approved July 4, 1836, entitled "An act granting half pay to widows or orphans where their husbands and fathers have died of wounds received in the military service of the United States in certain cases and for other purposes," it is provided that, "if any person who served in the war of the Revolution in the manner specified in the act passed the 7th day of June, 1832, have died leaving a widow whose marriage took place before the expiration of the last period of his service, such widow shall be entitled to receive, during the time she may remain unmarried, the annuity or pension which might have been allowed to her husband," etc. Here the language of the act would appear to be less ambiguous and doubtful even than in the act under consideration. The widow shall be entitled to receive the pension granted by said act only "during the time she may remain unmarried," but yet, on March 3, 1837, Congress passed an act which provides that "the benefits of the third section of said act of 1836 shall not be withheld from any widow in consequence of her having married after the decease of the husband for whose services she may claim to be allowed a pension or annuity under said act, provided that she was a widow at the time it was passed." In this last act there was no new right created, no new class of beneficiaries introduced, but simply an enactment that the provisions of said former act of July 4, 1836, should not be withheld from certain widows who had married again. This is evidently but a legislative construction of said former act, growing out of an effort on the part of executive officers of the Government to exclude said widows from the benefits of said act, just as in the present instance; and by said construction Congress virtually said that the second marriage of said widows did not destroy their status of widow-

hood so far as their right to claim pension by virtue thereof under said act is concerned. In construing the last above-mentioned acts of Congress it was held by Attorney-General Felix Grundy, in an opinion of August 2, 1839, that, "as the act of 1837 had removed the objection to the second marriage and allowed the pension to the widow, although she had married again, providing she was a widow on the 4th of July, 1836, I think a just construction of said former acts will embrace the widows of Revolutionary officers and soldiers who married a second time whenever they shall again become widows." And again, in the act of February 3, 1853, entitled "An act to continue half pay to certain widows and orphans," it is provided in the first section thereof that "in case of the death or marriage of such widow before the expiration of said term of five years the half pay for the remainder of the term shall go to the child or children of the deceased officer or soldier," etc.

On August 5, 1854, it was provided by Congress in the third section of an act entitled "An act making appropriation for the support of the Army for the year ending the 30th of June, 1855," that "the act approved February 3, 1853, entitled an act to continue half pay to certain widows and orphans, shall not be so construed as to deprive any widow from the benefits therein granted for the services of her husband, though she may have married again, provided, however, that the appellant is a widow at the time of making her claim; provided such party shall not receive pension during coverture." This last, like the former instance quoted, is in terms a legislative construction of the language employed by Congress in the act of February 3, 1853, and is clearly antagonistic to the view that, in the absence of legislation to that effect, the widow of a soldier loses her status of widowhood so far as pension is concerned, and the benefits granted to widows by the pension laws, simply by virtue of a second marriage.

In discussing this question we are not left simply to reason by analogy as above, for the principles now under discussion have been made the subject of judicial decision and passed upon by the Court of Claims in the case of Elizabeth Poucher against the United States, found in the first Court of Claims Reports, page 207. This was a suit brought by said Elizabeth Poucher to recover arrears of pension due her as the widow of a Revolutionary soldier, under the acts of 1838, 1842, 1843, 1844, and 1848. She was married in October, 1793, to a soldier of the Revolution, who died August 25, 1835. On July 8, 1839, she married again, and eighteen years thereafter, on January 21, 1857, her second husband died. A pension was granted to her from the death of her second husband as the widow of her first husband, the Revolutionary soldier, but was denied her during the period of her first widowhood. The language of the act approved July 7, 1838, which prohibits the continuance of a pension to a widow of a revolutionary soldier in the event of remarriage, is the same in substance with that of the act of March 9, 1878, being *that "in the* event of the marriage of the widow said an-

nuity or pension shall be discontinued." The court in construing said act clearly distinguishes, as has been above attempted herein, between the title to pension and the application for money, or the right to receive it, and states "the existing marriage bars the latter, but, by the express words of the act, does not bar the former."

The court proceeds to construe the various acts under which the claimant's title to pension arose, holding that the acts succeeding the act of July 7, 1838, merely extend its provisions, and holds that the claimant was entitled to pension under said act, notwithstanding her second marriage, during the period of her first widowhood, and approved of the action of the Commissioner of Pensions in granting her a pension from the death of her said second husband in 1857, but denied her a pension during the period that she was married to her second husband, thus holding, in effect, that she was entitled to pension notwithstanding said second marriage during the time that she remained a widow, but not so entitled while under coverture. The position of the Court in this case is directly adverse to the view which you maintain, that the second marriage of a widow destroys her status of widowhood and that said status is not revived upon her again becoming a widow. Upon this point the court says, with regard to the claimant in said case:

> After living as his wife (that is, the wife of the Revolutionary soldier, through whom she claims pension) for a period much exceeding the average of married life, she is left by him with a claim upon the generosity of his country. After attaining an age much exceeding the average of human life she voluntarily lays aside her name and ceases to be his widow. Now she seeks to return to the condition of her first widowhood, and, without resuming the name of the deceased soldier, to draw to herself the advantages of having been his wife. Out of its great gratitude, and lest one so closely connected with one of the patriot founders of the Republic should suffer want, the Government willingly accedes to her demand.

The Department is convinced that the views herein expressed are in consonance with sound reason and with the law upon this subject, as it has always been administered since the foundation of the Government, and, therefore, the former departmental decision in this case will be adhered to.

DISLOYALTY—ACT OF MARCH 3, 1877.

CORNELIUS WARREN.

1. Enlistment and muster defined.
2. Muster presupposes a regular enlistment.
3. The term "voluntarily enlisted," in the act of March 3, 1887, construed and applied.
4. Pension laws should be so construed as to carry into effect the real design of the law-making power.

Assistant Secretary Hawkins to the Commissioner of Pensions, October 12, 1888.

I have considered the appeal of Cornelius Warren, late private Company I, Thirteenth Tennessee Cavalry (claim No. 248,281) of August

14, 1888, from your office decision of January 7, 1886, rejecting his claim for invalid pension on the ground of "disloyalty, the claimant having voluntarily served in the Confederate service after his enlistment in the Union Army."

You state in your report to this Department in this case, under date of September 24, 1888, as follows:

In his original declaration filed February 5, 1878, claimant alleges that in March, 1865, he contracted disease of the back and lungs. The claim was rejected January 7, 1886, upon the ground of disloyalty, the claimant having voluntarily served in the Confederate service after his enlistment in the Union Army. The act of Congress approved March 3, 1887, will not operate in his behalf.

From this action of the office claimant now appeals, contending that he never voluntarily served in the Confederate army, that he was conscripted, came home in January, 1864, and was enlisted in the United States by William Arrendiell, a regular recruiting officer; that before he could get through the lines he was taken by his captain and compelled to go back to the Confederate army, and had there to remain till the fall of 1864, when he left the Confederate army and came to his home in Johnson County, Tenn.; that soon after he made his way through the Confederate lines and joined the Thirteenth Tennessee Cavalry; and that he was always a loyal man and not in the Confederate army as a matter of choice.

The record shows the following facts: Was enrolled in Company I, Thirteenth Tennessee Cavalry, January 15, 1864, at Taylorsville, and mustered into service October 25, 1864, at New Market, Tenn., was mustered out of service with company, September 5, 1865. The roll of Company F, Battalion North Carolina Infantry, from November 1, 1862, to February 26, 1863, show that claimant enlisted November 1, 1862, at Taylorsville, Tenn., by Capt. B. R. Brown, for the war. Rolls from June 30 to December 31, 1863, present for duty. From December 31, 1864, to May 1, 1867, absent sick. From May 1 to August 31, 1864, and roll dated October 28, 1864, absent without leave.

The claimant, being specially examined with regard to his service in the Confederate army, stated as follows:

I was arrested as a conscript and they gave me the privilege to volunteer or to be sent off as a conscript. I chose to volunteer and went into Captain Brown's company. I went into the rebel service in the fall of 1862, remained there till after the Chickamauga fight; about that time our company got broke up like and all came home, and I saw Lieutenant Arrendiell and enlisted in Union Army. This was in January, 1864, just before we were to start to the rebel army. Lieutenant Arrendiell was in this county, this side of Taylorsville he had scouted through the lines; I did not go to the Union Army with the lieutenant. I did not get through till last of September or first of October, 1864. When I found I could not go through the lines and was likely to be captured, I went back to my company in the rebel regiment. I staid there till July, 1864, then I was sent home. I was scouting in the mountains, attempting to join the Union Army, and got through the lines as quick as I could, and reached them at Bull's Gap.

Capt. B. R. Brown, specially examined, testifies that claimant was in affiant's company, in the Confederate service, from December 11, 1862, until fall of 1864. He was on duty in the spring and summer of 1864.

From the record and claimant's own admission, that, after his enlistment in the United States service in January, 1864, he voluntarily returned to his company in the Confederate service where he remained till July, 1864, it must be held that the act of Congress approved March 3, 1877, does not afford any relief in this case, and that the rejection of the claim was not error, but should be adhered to.

OPINION.

Section 4716 of the Revised Statutes provides as follows:

No money on account of pension shall be paid to any person, or to the widow, children, or heirs of any deceased person who in any manner voluntarily engaged in, or aided or abetted the late rebellion against the authority of the United States.

Subsequent to the passage of this law, Congress provided for the removal of the disability of certain persons who had participated in the rebellion, in an act entitled "An act amending the pension laws so as to remove the disability of those who, having participated in the rebellion, have, since its termination, enlisted in the Army of the United States, and become disabled." The act provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the law prohibiting the payment of any money on account of pensions to any person, or to the widow, children, or heirs of any deceased person who, in any manner, engaged in or aided or abetted the late rebellion against the authority of the United States, shall not be construed to apply to such persons as afterward voluntarily enlisted in the Army of the United States, and who, while in such service, incurred disability from a wound or injury received or disease contracted in the line of duty.

Approved, March 3, 1877.

The claimant in his special examination testified before the special examiner, December 10, 1885, in relation to the manner of his alleged enlistment and the circumstances under which he joined the Union Army, responding to interrogatories as follows:

Q. Were you in the Confederate service at any time?—A. I was; I was arrested as a conscript and they gave me the privilege to volunteer or be sent off as a conscript. I chose to volunteer and went into a company commanded by Capt. Roby Brown, and the regiment was commanded by Colonel Tolk. I can not give the letter of the company or number of my regiment. I went into the rebel service in the fall of 1862; can't give the month. I remained in that company till after the Chickamauga fight. About that time our company got broke up like, and we were all scattered and all came home so far as I know, and I saw Lieutenant Arrendiell and enlisted in the Union Army. This was in January, 1864, just before we went to start back to the rebel army. Lieutenant Arrendiell was in this county, this side of Taylorsville. He had scouted through the lines.

Q. Did you go to the Union Army with Lieutenant Arrendiell?—A. I did not; I did not get through till the last of September or the first of October, 1864.

Q. Where were you during this time?—A. I found I could not get through the lines and was likely to be captured, and I went back to my company in the rebel regiment. Captain Brown was getting the men together.

Q. How long did you stay in that service after this?—A. I staid from that time in the winter till July, 1864. I was at that time sent back home and I got away from them.

Q. Where were you from July until you joined the Thirteenth Tennessee?—A. I was scouting in the mountains.

Q. Did you make any attempt to join the Union Army?—A. I did; I was trying to get with them all the time. I got through the lines as quick as I could. Reached them at Bull's Gap.

Q. Where was your command, Captain Brown's company, stationed during the winter, spring, and summer of 1864?—A. The regiment was collected at Asheville, N. C., and was then taken to the eastern part of North Carolina, to Kingston, and kept

there till in the summer. I come from there with a party to get horses, and I made my escape from the command.

Q. Who beside you enlisted with Lieutenant Arrendiell in January, 1864?—A. I can not tell of anybody now living.

Q. Were you arrested and taken back to Captain Brown's company?—I was not. I heard that the general was around picking up the men, and I saw no way to get away and reported to my company.

Q. Was there any one with you when you enlisted with Lieutenant Arrendiell?—A. There was not. The only way any one could see him was to send round by his wife and he would meet him somewhere.

Q. Did any one but Arrendiell know of your enlistment in the Union Army at the time?—A. I do not know that any one did.

Q. Did you sign any enlistment papers?—A. I did not. I told him to put my name down. I did not sign any papers.

The records in the Adjutant-General's office show:

In the case of Cornelius Warren there is no original enlistment or muster-in roll showing him to have been enrolled or mustered into the service of the United States as an enlisted man in Company I of the Thirteenth Regiment of Tennessee Cavalry Volunteers, on file in this office up to date. The muster-rolls of Company I of that regiment contain the following evidence of service: Enrolled January 15, 1864, at Taylorsville, and mustered into service October 25, 1864, at New Market, Tenn., to serve three years. Roll of company from June 30, 1864, to April 30, 1865, are not on file. May and June, 1865, report him—blacksmith, absent; sick at Elizabethton, Tenn. His name is not borne on returns for March or April, 1865. He was mustered out of service with company, September 5, 1865, at Knoxville, Tenn.

The words "enlisted in the Army of the United States," contained in the act of March 3, 1877, must be understood to mean a legal enlistment within the meaning of the rules and regulations of the Army of the United States. This contemplates the execution in triplicate of all enlistment papers on the part of the recruit and the administration of the oath of enlistment within six days thereafter. One of these enlistment papers is required to be sent by the recruiting officer to the Adjutant-General; a second to the superintendent of the recruiting office; and a third to the recruiting depot at the time the recruit is forwarded. (United States Army Regulations, paragraphs 764, 766, 767, and 772, pages 73 and 74, 1881.)

A regular, legal enlistment also contemplates a medical examination, and, in the absence of a medical officer provided for that purpose, it becomes the duty of the recruiting officer to personally make the examination. (Paragraph 784, United States Army Regulations, 1881.) There ought, therefore, to be no difficulty in determining the question whether the claimant did or did not enlist. The period of enlistment in case the recruit was subsequently accepted by the Government is clearly fixed by the administration of the oath of enlistment, the recruit having previously subscribed his application to enlist. From the moment the recruit takes the oath of enlistment he ceases to be a private citizen and becomes subject to the laws, rules, regulations, and orders governing the military or naval service. The recruiting officer is at once authorized to exercise his control over him; prior to administering *the oath he has no* authority or control over the recruit.

In our military system all enlistments are now accompanied by the taking and subscribing of an oath of allegiance, service, and obedience, in writing, which oath properly certified constitutes the almost invariable formula of all contracts of enlistment. (1 Winthrop, Military Law, page 774.) The significance of the oath as the main feature of general enlistment is indicated by the description "duly sworn," as used in the fourth Article of War, providing for the discharge of soldiers from the service. The following is the language referred to:

ART. 4. No enlisted man *duly sworn* shall be discharged from the service without a discharge in writing, signed by a field officer, etc. (Sec. 1342, R. S.)

Enlistment is a contract between an able-bodied man, duly qualified for the military or naval service, and the United States Government, made through its authorized officers or agents, wherein the recruit obligates himself by oath to serve in the military, naval, or marine service for a certain period of time, in consideration of such bounty, rations, pay, and clothes as are or may be established by law. The Government reserves the right to modify, reject, or rescind the contract at its discretion, agreeable to those principles or considerations of expediency and economy expressed in the term "public policy."

As stated by the honorable Caleb Cushing, as Attorney-General, October 25, 1853:

Enlistments into the Army, made under the inducements held out by the laws of the United States, are contracts, and, although the Government be a party, still the contracts ought to be construed according to those well-established principles which regulate contracts generally. (Vol. 6, Opinions of Attorney-General, page 190.)

While the rules and regulations of the Army require that the evidence of the contract of enlistment be reduced to writing, yet the contract, strictly speaking, belongs to that class of mixed transactions, part of which is in writing and part not; and the rule, which excludes all oral evidence of the subject-matter of a written contract, is, therefore, not applicable to a contract of enlistment. (Wharton, Evidence, paragraph 1016; 2 Best on Evidence; notes by Am. Ed., page 891; Bishop on Contracts, paragraphs 57, 58, and 62; 40th Michigan Supreme Ct. Rept., page 88, and cases therein cited.)

Applying the foregoing principles to the evidence in this case, the Department is clearly of the opinion that claimant was not enlisted within the meaning of the act of March 3, 1877, on the 15th day of January, 1864. His alleged enlistment consisted in his meeting, clandestinely, Lieutenant Arrendiell and telling him "to put his name down." Undoubtedly both the lieutenant and the claimant understood the agreement to be that claimant would enlist in Company I of the Thirteenth Tennessee Cavalry, an organization that was then being formed by said lieutenant.

Claimant testified that he did not sign any enlistment papers at this time, nor is there any evidence in the case that he took the oath which was necessary to enlistment in the United States service, prior to the date of his being mustered October 25, 1864.

The record appears to sustain this view. The report of the Adjutant-General, is that in the case of Cornelius Warren there is no original enlistment or muster-in roll showing him to have been enrolled or mustered into the service of the United States as an enlisted man on file in this office. The muster-in rolls of Company I, it is true, show that claimant was enrolled January 15, 1864, and mustered into the service October 25, 1864. The word "enrolled" is not synonymous with "enlistment" and may refer to the list of recruits made out by the officer who was organizing his company. It is not claimed that the claimant was present with his company from January 15, 1864, until October 25, 1864, the date at which he was mustered; if absent without leave, or a deserter, the natural presumption would be that he would have been tried by court-martial therefor; on the contrary the record shows that he was accepted into the service and mustered at the latter date to serve three years, and that he was regularly mustered out of service with his company September 5, 1865.

The claimant testified that, during the time he gave his name to Lieutenant Arrendiell, until the last of September or the first of October, he was trying to get through the rebel lines and join the organization in which he was subsequently mustered. Leaving out of the question the discussion as to whether claimant's service in the Confederate army, subsequent to January 15, 1864, and prior to October 25, 1864, was voluntary or involuntary, the Department is clearly of the opinion that such service is immaterial in this case for the reason that claimant was not "enlisted in the Army of the United States" prior to October 25, 1864.

In the case of Florida Kennerly, certificate No. 1261, decided by the Department February 5, 1888 (2 P. D., page —), in passing upon the question as to whether the husband of claimant was "duly enlisted," the following language is used:

> The words "duly enlisted" can have but one signification, and necessarily mean a regular, legal enlistment, such as is authorized by law and recognized by military rule and precedent.

Winthrop, in his Military Law, defines muster-in as "the assembling, inspecting, entering upon the formal rolls, and officially reporting as a component part of the command, of persons or public animals." (See page 782, paragraph 2.) The term muster-in, or muster-into, though sometimes confounded with "enlistment," is only properly employed to designate the formal admission (upon inspection, administering of the oath, etc.) into the United States service of militia or other State troops, or troops raised under State authority. The term is, strictly, without application to the Army proper into which persons are admitted only by enlistment and separately." (*Ib.*, page 760.)

While the Department does not desire to be understood as holding that a man is not regularly enlisted until he is mustered, yet, if, as in this case, there was no proof of enlistment prior to muster, his date of

enlistment would be from the date of muster under the rule of presumption.

The Government should, upon all principles of equity and fair dealing, be estopped to deny enlistment, where the recruit has been regularly mustered and discharged, as muster presupposes enlistment.

It is unnecessary to discuss the subject of irregular enlistments, or of enlistments that have not been in conformity with the law, rules, and regulations of the Army and Navy. Claimant establishes his case, so far as enlistment is concerned, by proof of muster.

Your office decided that enlistment, January 15, 1864, was established by the admission of claimant, and the record which showed enrollment, January 15, 1884. Only a portion, however, of his admission and a portion of the record is quoted. The whole admission must be taken together. (1st Greenleaf on Evidence, paragraph 201 and note 2.) When so taken it not only fails to prove enlistment, but on the contrary disproves it.

The act of March 3, 1877, was remedial and designed to confer the benefits of the pension laws upon a class of soldiers who were excluded under the provisions of section 4716. Congress recognized the fact that, in the border States, men who were loyal to the Government were forced into the Confederate army, but, at the first opportunity evinced their loyalty by entering the United States Army. The claimant appears to be one of the class within the intendment of the law. It is not denied that, subsequent to his service in the Confederate army, he voluntarily enlisted and was mustered in the Army of the United States, and served honorably until his discharge with his company.

To hold that the words, "voluntarily enlisted," mean an enlistment which did not involve any action on the part of the recruit, except a verbal request, or an "enrollment" by the recruiting officer, without the administration of an oath, would be to place a strained and unauthorized construction upon the statute. The statute of March 3, 1877, granted a remedy to a deserving class of soldiers who, prior to its enactment, had no benefit of the pension laws. The act was remedial, not penal. As stated by the honorable Caleb Cushing, Attorney-General, in the opinion hereinbefore cited (Vol. 6, page 191):

> Statutes which concern the public good in a remedial, as distinguished from a penal sense, as laws for the advancement of learning, the support of the poor, the safeguard of political institutions, protection and security of life and property, and the like, are to be construed in the sense of enabling rather than disabling, and in such wise as to attain the proposed end.

The pension laws come clearly within the class of statutes which are entitled to a liberal, as contradistinguished from the strict, construction given to the criminal statute or statutes involving a forfeiture, grants, etc. The intention of Congress should be constantly kept in view, and the pension laws so construed, where construction is necessary, as to carry into effect the design of the law-making power.

Your action in rejecting this claim, for the reasons stated, is hereby reversed, and you will please adjudicate the claim in conformity with the opinions of the Department herein expressed. The papers accompanying your letter of transmittal of September 24, 1888, are herewith returned.

CERTIFICATE OF DISABILITY—CONFLICTING EVIDENCE.

JACOB S. PROBASCO.

A certificate of disability upon which a soldier was discharged from the service may be overthrown by conflicting evidence given years subsequent thereto by credible and corroborating witnesses, the statements contained in said certificate not being in themselves conclusive as to the facts to which they relate.

Assistant Secretary Hawkins to the Commissioner of Pensions, November 26, 1888.

Herewith are returned the papers which accompanied your report of November 9, 1888, upon the appeal of Jacob S. Probasco, late private, Company "E," First Iowa Cavalry, from your action rejecting his claim for invalid pension, No. 517,151.

It is shown by the records of the War Department that the soldier was enrolled July 31, 1861, for three years, and reported present for duty from muster in to August 26, 1861. He was discharged October 26, 1861, on surgeon's certificate of disability, because of "epilepsy, or convulsions, contracted during his service which has entirely disqualified him for performing his duty as a soldier."

The commanding officer states that "during the last fifty days the soldier has been afflicted with epilepsy, which has disqualified him for the performance of military duty. His disease was contracted during his service."

July 3, 1884, he filed an informal declaration, alleging that, while in the service and line of duty at Benton Barracks, Mo., in September, 1861, he was "attacked by the disease known as epilepsy, occasioned by exposure to inclement weather;" whereupon he was medically examined by the board of surgeons, of Creston, Iowa, August 27, 1884, which reported as follows:

No physical signs of epilepsy; claimant gives no satisfactory cause of said disability. He is broken down in general appearance, but his habits have been none of the best. Says he has spells three or four times a day for a while, which do not recur for some time. Can not determine from his statements that said epilepsy was due to his army service. If of service origin, he might be rated for same.

November 29, 1884, he filed a formal declaration, in which he alleged "epilepsy," as before, as cause for pension, but without any allegation as to origin of said disability.

The case was specially examined to determine the value of the testi-

mony on file, resulting from which, after a careful consideration of the testimony, the claim was rejected by your office September 24, 1888, on the ground that the record fails to show a cause of origin, and claimant has failed to prove an adequate cause of origin due to his military service, except a blow, or blows, on his head, the apparent result of a fight or an assault, which is not shown to have originated in the line of duty.

From this adverse action the appeal is taken.

The contention of the appeal is that the evidence, considered in connection with appellant's military record or discharge paper, sufficiently shows that his disability is due to his army service.

Appellant alleges epilepsy contracted in the United States service and in line of duty at Benton Barracks, Mo., in September, 1861, by exposure to inclement weather.

It is plain that appellant had not been exposed from the time he enlisted in July until discharged in October. The regiment went into camp at Burlington, Iowa; then moved to Keokuk and remained for a short time; then moved back to Burlington for a short time; then went to Benton Barracks, Mo. The appellant was discharged on the 26th day of October, 1861, after serving three months in the camps at Burlington, Keokuk, and at Saint Louis during August, September, and October, 1861. The regiment had not as yet done any field service nor endured any hardships.

It is clearly and satisfactorily shown by reliable witnesses that appellant was well and healthy at enlistment, and was in the same physical condition when he returned to Mount Pleasant, the place of enlistment, in October, 1861, and continued so up to 1878 or 1879, when he left Trenton to go to Creston, Iowa.

W. P. McClure, late lieutenant, testifies that claimant had a fit in the service, and the boys said he fell into the fire; called the attention of the surgeon, Dr. Allen, to his case, who seemed to know all about it from what had taken place before, and he got up the discharge papers. Claimant told deponent that he had had fits before. Did not learn that he had fits before enlistment, but the impression gained by deponent was that claimant had them prior to the service. The doctor said claimant was "no good" and he would muster him out. This witness subsequently qualifies this statement by saying that he got the impression that claimant had fits in the service prior to the one he had when he fell into the fire, but knows nothing about any he had prior to enlistment. Recollects that claimant got a pass to go to Burlington, and when he returned he was cut about the face, and a bad cut over the eye. He said some one had knocked him down and robbed him. Impression was that he had been drunk, though deponent never saw him so. Never knew about his going to town for a horse for Captain Thompson, as he has stated, but his statement as to how he got hurt is in accordance with what he told deponent. Knows nothing about him since his discharge.

T. A. Berriman, second lieutenant, testifies that claimant had the reputation of a drinking and spreeing man in the service, and it was Captain Thompson's idea when he signed the discharge paper to get rid of him. Has seen him since his discharge, and his appearance indicated a drinking man.

Clark Lynch, comrade, testifies that he recollects claimant's coming into camp near Burlington with his eye hurt. Understood he had been on a spree and received his injury in a fight.

Harriet Wierholtz, appellant's former wife, testifies that she was married to claimant February 20, 1862, and lived with him about four years, when she obtained a divorce on the charges of drunkenness, adultery, and non-support; that she only knew him two or three months prior to joining the Army in 1861, when he appeared to be in good health and to have fairly good habits; but after returning from the service he kept a saloon and became exceedingly reckless in his conduct. Knew nothing about his having epileptic fits, except as she saw it on his discharge paper. All his sickness after return from the Army seemed to her to be the result of his dissipation.

This witness's statements are fully corroborated by several reliable witnesses.

The record evidence of origin is so explicit as to be self-destructive. How was it possible for Captain Thompson and Surgeon Allen to know that epilepsy, appearing within six weeks after enlistment, was contracted in the service, in absence of a specific cause? In the nature of things, and at the very most, this could only have been an opinion based upon the soldier's statements. And can I feel assured that they had any better authority for the diagnosis itself? The epilepsy appears to have suddenly ceased as soon as claimant was free of the service.

Assuming that epilepsy did originate in the service, it seems to me far more likely that it resulted from the blow upon the head, which he says he received at Burlington, than from exposure in the months of July, August, and September in the camps of Iowa and Missouri. The conclusion is almost necessary, from his statement and in light of his character, that this injury was received outside line of duty.

After his service of three months and five days this soldier waited twenty-three years after discharge before applying for a pension for a disability that he was sure that he had contracted in the service and had a record of.

From a careful consideration of all the evidence in this case I am of the opinion that appellant was a malingerer in the service; that his present condition is the result of his vicious habits, and that he did not contract epilepsy nor any other disease while in the service and line of duty.

For the reasons above stated your action rejecting this claim is affirmed.

INCREASE—DOUBLE SPECIFIC DISABILITIES.

CHARLES LOVELY.

Where soldier applies for increase of pension under and by reason of the act of February 28, 1877, which provides that "all persons who, while in the military or naval service of the United States and in the line of duty, shall have lost one hand *and* one foot or been totally and permanently disabled in both shall be entitled to a pension for *each* of such disabilities and at such rate as is provided for by the provisions of *existing laws* for *each* disability," the Department holds that the term "existing laws" should be construed as *limited* to the laws existing at the date of the passage of said act, and not as embracing "all laws which might thereafter be called into existence."

Assistant Secretary Hawkins to the Commissioner of Pensions, November 24, 1888.

Herewith are returned the papers which accompanied your report of the 15th of October, 1887, upon the appeal from the decision of your office rejecting the claim of Charles Lovely for increase of pension, certificate No. 44810.

The said Charles Lovely is laboring under disability from amputation of the right leg above the knee and of left arm above the elbow. His pension was allowed at $8 per month from February 6, 1865; at $20 per month from March 4, 1865; at $24 per month from June 4, 1872, and at $36 per month from February 28, 1877, under the act of that date. On the 11th of September, 1884, he filed an application for increase of pension, in which he claimed the rate of $24 per month for each of his separate disabilities. He also stated that he could not wear artificial limbs, and that he required the assistance of a second person.

On the 24th of October, 1884, the pensioner was informed that there was no law under which he could be allowed a higher rate of pension than $36 per month.

From the action rejecting the claim for a higher rate this appeal is taken.

The question whether the act of February 28, 1877, would permit the allowance of a higher rate than $18 per month for *each* one of the separate disabilities, under which the applicant labors, was submitted to the Assistant Attorney-General for this Department, who, under date of November 19, 1888, gave the following opinion:

Hon. D. L. HAWKINS,

Assistant Secretary of the Interior:

SIR: Agreeably to request I have carefully considered the question which you verbally presented to me, affecting the case of Mr. Charles Lovely, an applicant for an increase of pension. Said question involves a consideration of the construction which it is proper to give to the various acts of Congress granting pensions to honorably discharged soldiers, who—

While in the military or naval service of the United States, and in the line of duty . . . . . have lost one hand and one foot.

As the result of such consideration, I beg leave to submit the following Section 4698 of the Revised Statutes provides that—

From and after June fourth, eighteen hundred and seventy-two, all persons entitled by law to a less pension than hereinafter specified, who, while in the military

or naval service of the United States, and in line of duty shall have lost . . . . one hand and one foot, or been totally and permanently disabled in the same or otherwise so disabled as to be incapacitated for performing any manual labor, but not so much as to require regular aid and attendance, shall be entitled to a pension of twenty-four dollars per month; and all persons who, under like circumstances, shall have lost one hand or one foot, or been totally and permanently disabled in the same . . . . . shall be entitled to a pension of eighteen dollars per month, etc.

Under this law it will be seen that, while a soldier, who had lost either a foot or a hand, was entitled to a pension of $18, the soldier who had lost both a foot and a hand was entitled to a pension of only $24 per month.

So the law seems to have stood until February 28, 1877, when Congress enacted—

That all persons who, while in the military or naval service of the United States, and in the line of duty, shall have lost one hand and one foot, or been totally and permanently disabled in both, shall be entitled to a pension for each of such disabilities, and at such rate as is provided for by the provisions of existing laws for each disability.

This is the last legislation I find purporting to grant a pension for the specific injury resulting from the loss of both a hand and a foot. But an act of Congress, passed in 1883, increased the amount of pension to be allowed for the loss of one hand or one foot to $24 per month. (See 22 Stat., 453.) And again: August 4, 1886, (24 Stat., 220), an act was approved raising from $24 to $30 per month the pensions of soldiers who lost one hand or one foot. But neither of these two last-named acts makes any mention of soldiers who had lost one hand and one foot.

It seems to have been claimed, however, that, when construed together, the said act of February 28, 1887, and that of 1886, operate to raise the pension of a soldier who has lost one hand and one foot to $30 per month for each, making $60 for the two.

Recurring again to the language of said act of 1877, it provides (with reference to soldiers who shall have lost one hand and one foot) that they—

Shall be entitled to a pension for each of such disabilities, and at such rate as is provided for by the provisions of the existing laws for each disability.

And it is contended that this act of 1877 so governs and controls the subsequent acts of 1883 and 1886 as to make an increase of pension, which said last-named acts declare shall be allowed to a soldier who has lost one hand or one foot, redound also to the benefit of a soldier who has lost both a hand and a foot. In order to reach this conclusion, it is claimed, in effect, that when, in said act of 1877, Congress provided that soldiers who had lost one hand and one foot should be entitled to a pension for each of such disabilities, and at such rate as "is provided for by the provisions of existing laws," it was not intended that said words, "existing laws," should be limited in their signification to such laws as were then existing, but that it was the intention of Congress that they should embrace all laws which might thereafter be called into existence.

It will be observed that neither in said act of 1883, nor in that of 1886, is any mention made of soldiers who had lost both a foot and a hand; and it seems to be a proposition as unsound as it is novel that one Congress could, even if it would, so far control the force of future Congressional pension legislation as to cause such future legislation to either increase or diminish the compensation to be paid to a given class of pensioners, without their being either mentioned or even remotely referred to in such future legislation.

But was it the intention of Congress when using the words "existing laws," in said act of 1877, to embrace laws thereafter to be enacted, or was it the intention to limit the signification of said words to laws in existence at the time when said act was passed?

It seems to me that the language employed leaves no room for doubt or cavil on that point. Referring *to soldiers who* shall have lost one hand and one foot, they "shall," *says the act, "be entitled to a* pension for each of such disabilities, ... and *at such a rate as is (not such a* rate as *may hereafter* be) provided;" but "such a rate *s is provided for by the provisions* of the existing laws for each disability."

The debates of Congress of 1877, however, have been invoked in support of the theory that the said acts of 1883 and 1886, successively, came within the meaning of the words "*existing* laws," as used in said act of 1877. But it seems to me that, so far as said debates go to establish anything, they tend to establish exactly the contrary proposition. For example, it is stated that when the said act of 1877 was being considered in the House, Mr. Holman, of Indiana, called for an explanation of the effect of an amendment of the original bill, whereupon Mr. Rusk (who seems to have had principal charge of the bill) said:

The Senate bill proposes to make the pension for the double disability $37. The amendment proposed by the committee . . . . . gives a pension for *each* disability, according to the provisions of the present law.

Not, it will be observed, according to the provisions of present or future laws; but "according to the provisions of the present law."

And provided a man lost a hand and a foot, he receives $36 per month, $1 less than the Senate bill proposed to give." (Congressional Record, 2, 44, Vol. 21, p. 521.)

I can not see how this explanation of Representative Rusk lends any force to the theory that the words "existing laws," a employed in the act then under consideration, were intended to include such laws as might in *future* be enacted.

I am therefore of opinion that, under the law, the pension due to a soldier, who under the circumstances above stated, lost a foot and a hand, is $36 per month.

I do not understand that I am called upon for any opinion, and, therefore, I express none as to the other features of Mr. Lovely's case.

I return herewith the papers in the case.

Very respectfully,

Z. MONTGOMERY,
Assistant Attorney-General.

The opinion of the Assistant Attorney-General sustains the action which has been taken on cases similar to that under consideration during the period since the 28th of February, 1877, the date of the passage of the act concerning which the opinion was given. The opinion is accepted by this Department as the proper construction of the law. During the period since February, 1877, the rates of pension for the higher grades of disability have been liberalized by acts of Congress, but the disabilities under which this applicant labors are not referrrd to in those acts.

The rate of pension allowed by the act of February 28, 1877, for the loss of a hand and foot is not proportionate to the rates allowed by existing laws for other high grades of disability, and it is not in the power of this Department to correct this inequality. No equity powers in respect to this matter are vested in the Department.

The condition of the pensioner on account of amputation of the arm and the leg is not one of total and permanent helplessness, requiring the regular aid and attendance of a second person. He is, therefore, not entitled to the rate of pension provided for total and permanent helplessness. The evidence on file shows that the amputation of the leg was not so near the hip, nor that of the arm so near the shoulder, as to bring the case within the provisions of the act of August 4, 1886, providing a pension of $45 per month for those who have lost "either an arm at the shoulder-joint, or a leg at the hip-joint, or so near the joint as to prevent the use of an artificial limb."

The decision of your office in the case is affirmed.

SPECIFIC DISABILITIES - ARREARS - INCREASE - RERATING.

OSCAR DUNLAP.

The Department construes and applies—

1. The act of February 28, 1877;
2. The act of June 16, 1880;
3. Section 4698½, Revised Statutes of the United States—the aforesaid Acts and Section having reference to pensions, for specific disabilities, arrears, increase, and to rerating of pensions.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 5, 1889.

The papers in the case of Oscar Dunlap, late of Company I, Twenty-sixth Regiment Illinois Volunteers, having been considered in the adjudication of his appeal from the action of your office rejecting his claim for rerating and arrears of pension, certificate No. 66419, are herewith returned to you.

I.

The claimant in this appeal is pensioned at $50 per month for the loss of right hand and right foot, and also for an injury of the head, the latter causing epilepsy. These disabilities were incurred in the service and line of duty while claimant was acting as military conductor on the Louisville and Nashville Railway, December 28, 1864, when the train came into collision with a wrecked car near Memphis Junction, Ky., and he was thrown under the wheels while in motion, they passing over his right foot and right hand, and also injuring his head, the consequence being that his right foot was amputated above the ankle-joint and his right hand above the wrist; and thence ensued epileptic fits, due, as alleged, to injury of head. It appears from the history of the case that claimant was originally rated for the loss of a hand and a foot at $20 per month from the date of his discharge from the service, May 15, 1865, under the terms of the act of July 14, 1862, which provided that "those persons who, under like circumstances, shall have lost one hand and one foot, shall be entitled to a pension of $20 per month." This rate was subsequently increased to $24 per month, to commence from June 4, 1872, in accordance with the act of June 8, 1872, which provided that "all persons who, under like circumstances, shall have lost one hand and one foot, or been totally and permanently disabled in the same, or otherwise so disabled as to be incapacitated for performing any manual labor, but not so much as to require regular personal aid and attendance, shall be entitled to a pension of $24 per month." On the 28th of February, 1877, claimant's pension was increased to $36 per month, in conformity with the act of that date, said act having been passed by Congress to allow a pension at such a rate per month *for each of such* disabilities as is provided by the provisions

of the existing laws for each disability, the beneficiaries of said act being those only who shall have lost one hand and one foot or been totally and permanently disabled in both, the act being in the following terms, viz:

That all persons who, while in the military or naval service of the United States and in the line of duty, shall have lost one hand and one foot, or been totally and permanently disabled in both, shall be entitled to a pension for each of such disabilities and at such a rate as is provided for by the provisions of the existing laws for each disability: *Provided*, That this act shall not be so construed as to reduce previous pensions in any case.

The action of the Commissioner of Pensions, February 28, 1877, in issuing a certificate of $36 per month, in accordance with the terms of the aforecited act, was based upon the provisions in section 4698, Revised Statutes, whereby the sum of $18 per month was fixed as the specific rating for "each" disability, at that date, caused by either the loss of a hand or the loss of a foot; and, there being in this case the loss of both a hand and a foot, claimant was entitled to "a pension for each of such disabilities," or twice $18—aggregating $36 per month for the two disabilities combined. And, furthermore, the action of the Commissioner was sustained by the interpretation put upon the act of February 28, 1877, by the Hon. H. M. Teller, who, as Secretary of the Interior, April 2, 1884, in replying to the request of the Commissioner for an expression of his views "on the proper construction to be given (with reference to this same case, then pending before the Commissioner) to the said act of February 28, 1877, in connection with that of March 3, 1883," said:

The act of February 28, 1877, is peculiar in that it singles out persons disabled by the loss of a hand and a foot, and directs that the pension allowed to such persons shall be the sum of the rates for each disability, taken separately. In no other case does the law authorize the allowance to a pensioner of the sum to which he is entitled for each disability, rated separately. In all other cases the pension must be rated upon the extent of the disability from the combined effects of all the causes. The act of February 28, 1877, is, therefore, a special provision for a small class of pensioners to which the provisions of a law more general in its character, subsequently enacted, can not be applied. The act of February 28, 1877, must be construed in connection with its title. The title is, "An act to allow a pension of thirty-six dollars per month to soldiers who have lost an arm and a leg."

In other words (as the context of the statutes shows), "a hand and a foot."

The construction thus put by ex-Secretary Teller upon the act of February 28, 1877, was re-affirmed and approved by the Department in the case of Charles Lovely (P. D., 2 vol., p. 288), November 24, 1888, where-in the question whether the act of February 28, 1877, would permit the allowance of a higher rate than $18 per month for each one of the separate disabilities (the loss of an arm above the elbow and of a leg above the knee) under which the applicant labored, was submitted by Assistant Secretary Hawkins to Assistant Attorney-General Montgomery, who gave for the Department an opinion, in which he said:

who, while in the military or naval service of the United States and in the line of duty, * * * have lost one hand and one foot.

As a result of such consideration, I beg leave to submit the following: Section 4698 of the Revised Statutes provides that—

"From and after June fourth, eighteen hundred and seventy-two, all persons entitled by law to a less pension than hereinafter specified, who, while in the military or naval service of the United States, and in line of duty shall have lost * * * one hand and one foot, or been totally and permanently disabled in the same, or otherwise so disabled as to be incapacitated for performing any manual labor, but not so much as to require regular aid and attendance, shall be entitled to a pension of twenty-four dollars per month; and all persons who, under like circumstances, shall have lost one hand or one foot, or been totally and permanently disabled in the same * * * shall be entitled to a pension of eighteen dollars per month," etc.

Under this law it will be seen that, while a soldier who had lost either a foot or a hand was entitled to a pension of $18, the soldier who had lost both a foot and a hand was entitled to a pension of only $24 per month.

So the law seems to have stood until February 28, 1877, when Congress enacted—

"That all persons who, while in the military or naval service of the United States, and in the line of duty, shall have lost one hand and one foot, or been totally and permanently disabled in both, shall be entitled to a pension for each of such disabilities, and at such rate as is provided for by the provisions of existing laws for each disability."

This is the last legislation I find purporting to grant a pension for the specific injury resulting from the loss of both a hand and a foot. But an act of Congress passed in 1883 increased the amount of pension to be allowed for the loss of one hand or one foot to $24 per month. (See 22 Stat., 453.) And again, August 4, 1886 (24 Stat., 220), an act was approved raising from $24 to $30 per month the pensions of soldiers who lost one hand or one foot. But neither of these two last-named acts makes any mention of soldiers who had lost one hand *and* one foot.

It seems to have been claimed, however, that, when construed together, the said act of February 28, 1877, and that of 1886, operate to raise the pension of a soldier who has lost one hand or one foot to $30 per month for each, making $60 for the two. Recurring again to the language of said act of 1877, it provides (with reference to soldiers who shall have lost one hand and one foot) that they—

"Shall be entitled to a pension for each of such disabilities, and at such rate as is provided for by the provisions of the existing laws for each disability."

It is contended that this act of 1877 so governs and controls the subsequent acts of 1883 and 1886 as to make an increase of pension, which said last-named acts declare shall be allowed to a soldier who has lost one hand or one foot, redound also to the benefit of a soldier who has lost both a hand and a foot. In order to reach this conclusion it is claimed, in effect, that when, in said act of 1877, Congress provided that soldiers who had lost one hand and one foot should be entitled to "a pension for each of such disabilities," and at such rate as "is provided for by the provisions of existing laws," it was not intended that said words, "existing laws," should be limited in their signification to such laws as were then existing, but that it was the intention of Congress that they should embrace all laws which might thereafter be called into existence. It will be observed that neither in said act of 1883, nor in that of 1886, is any mention made of soldiers who had lost both a foot and a hand; and it seems to be a proposition as unsound as it is novel that one Congress could, even if it would, so far control the force of future Congressional pension legislation as to cause such future legislation to either increase or diminish the compensation to be paid to a given class of pensioners, without their being either mentioned or even remotely referred to in such future legislation.

But was it the intention of Congress, when using the words "existing laws," in said act of 1877, to embrace laws thereafter to be enacted, or was it the intention to

limit the signification of said words to laws in existence at the time when said act was passed?

It seems to me that the language employed leaves no room for doubt or cavil on that point. Referring to soldiers who have lost one hand and one foot, they "shall," says the act, "be entitled to a pension for each of such disabilities, * * * and at such a rate as is (not such a rate as may hereafter be) provided;" but "such a rate as *is* provided for by the provisions of the existing laws for each disability."

In view of the foregoing harmonious opinions of ex-Secretary Teller and Assistant Attorney-General Montgomery, the principles that should govern the construction of the act of February 28, 1877, relative to double specific disabilities, may be accepted as *res adjudicata;* and hence the action of your office in adjudicating this claim under that act, consistently with said principles, was not error, and is hereby reaffirmed as an established ruling of the Department.

II.

The claimant in this appeal sets out the grounds upon which he applies for the rerating and an increase of his pension, in an affidavit sworn to February 12, 1887, and filed in the Bureau of Pensions February 21, 1887, claiming that he was entitled to $25 per month, from June 6, 1886, under section 4697, Revised Statutes, which provides that—

* * for the period commencing June 6, 1866, and ending June 3, 1872, those persons entitled to a less pension than hereinafter mentioned, who, by reason of injury received or disease contracted in the military or naval service of the United States and in the line of duty, shall have been permanently and totally disabled in both hands (or who shall have lost the sight of one eye, the other one having been previously lost), or who shall have been otherwise so totally and permanently disabled as to render them utterly helpless, or so nearly so as to require regular personal aid and attendance of another person, shall be entitled to a pension of $25 per month.

It is obvious, however, from the actually alleged disabilities of claimant (the loss of a hand and a foot) that the terms of the foregoing section, as above quoted, do not describe his case, and that he can not therefore properly claim the benefits of its provisions. He could not be fairly rated for disabilities which he did not possess, nor in conformity with the requirements of a statute that does not describe his real complaints. Claimant further insists in the aforesaid affidavit, filed in the Pension Office February 21, 1887, that he is entitled to be rerated at $31.25 per month from June 4, 1872, under section 4698; at $50 per month from June 4, 1874, under the act of June 18, 1874; at $72 per month from June 17, 1878, under the act of June 16, 1880; and that he should be paid the difference, monthly, between these sums and what has been allowed him. It is apparent, however, alike from the very terms of the law under which claimant claims the aforementioned reratings, and from the nature of the disabilities alleged by him as the basis of pension, that he has relied upon statutes which do not describe the classification of pensioners to which he in fact belongs by reason of his disabilities—statutes, therefore, of which he can not claim to be a

beneficiary; and it is also apparent in the light of both the facts and the law that, when increasing claimant's ratings from time to time between June 8, 1872, and May 25, 1881, as shown by the records in the accompanying papers, you followed in each instance both the letter and the spirit of the law that was truly applicable to his case.

III.

The attorney for claimant, in his brief or argument addressed to the Secretary of the Interior November 6, 1888, appealing from the adverse action of your office, cites as the basis thereof so much of the ruling of the Commissioner of Pensions as in effect "denies the relator (claimant) the right to arrears of pension under the arrears of pension act, and as amended by the act of March 3, 1879, while conceding that the claimant's application for a pension for an *original* cause of disability was filed with the Commissioner of Pensions June 26, 1880, a date prior to July 1, 1880, and therefore within the express terms of the law declaring the petitioner to be entitled to such arrears of pension." It appears, however, that, at the time (June 26, 1880) when, as aforesaid, claimant's "application for a pension for an *original* cause of disability (*viz*, injury of head) was filed with the Commissioner of Pensions"—a date prior to July 1, 1880—claimant was pensioned for his specific disabilities (loss of hand and loss of foot), at the rate of $36 per month; and the "injury to head" was alleged as ground for the increase of rate on account of increased disability. There had not been granted to claimant at that date a pension for alleged injury of head—a non-specific disability. Claimant contends that, having filed his application June 16, 1880, setting up injury to head as an original cause of disability, he is entitled to the benefits of the act approved June 16, 1880—the terms of said act being the following:

> That all soldiers and sailors who are *now* receiving a pension of $50 per month under the provisions of the act to increase the pension of soldiers and sailors who have been totally disabled, approved June 18, 1874, shall receive, in lieu of all pensions now paid them by the Government of the United States, and there shall be paid them in the same manner as pensions are now paid to such persons, the sum of $72.
>
> SEC. 2. All persons whose pensions shall be increased by the provisions of the act from $50 per month to $72 per month shall be paid the difference between said sums monthly, from June 17, 1878, to the time of the taking effect of this act.

In considering the contention of claimant's appeal under the act of June 16, 1880, the inapplicability of it to his case becomes obvious from the fact that, at the date of the passage and approval of said act, claimant, as required by its terms, was *not* "receiving a pension of $50 per month under the provisions of the act to increase the pension of soldiers who have been wholly disabled, approved June 18, 1874;" and therefore the benefits of the former act do not belong to him. The alleged injury of head, as set forth in claimant's application for increase, filed June 16, 1880, is *not a specific* disability the rating for which is arbi-

trarily fixed by statute, but a disability the nature and degree of which must be determined by medical examination; and therefore the fact that the allegement of this "original cause" of disability was filed June 16, 1880, and prior to July 1, 1880, can not affect the status of the claim itself. Inasmuch as the alleged injury of head was non-specific under the law, and the question as to whether pensionable or not was dependent on the result of a medical examination, claimant's application for increase on account thereof came within the terms of section 4698½, Revised Statutes of the United States, viz:

SEC. 4698½. Except in cases of permanent specific disabilities, no increase of pension shall be allowed to commence prior to the date of the examining surgeon's certificate establishing the same made under the pending claim for increase, and in this, as well as all other cases, the certificate of an examining surgeon or of a board of examining surgeons shall be subject to the approval of the Commissioner of Pensions.

In conformity to the foregoing section, the first medical examination to which claimant was subjected in order to adjudicate the claim for increase, filed June 16, 1880, was made May 25, 1881, by Examining Surgeon D. A. Gratzen, at Champaign, Ill. As the result of said examination, the surgeon recommended that claimant be rated for loss of foot and of hand, and for injury of head, at $50 per month; and in accordance therewith the Commissioner of Pensions promptly issued to claimant his present certificate for increase of pension at $50 per month from May 25, 1881, the date of the above named medical examination. Subsequent examinations have resulted in an adherence to this rating.

IV.

Another of the mistakes into which claimant's attorney has fallen in his appeal for rerating and for increase of claimant's pension is in putting him, by the assumption of an equivalency of disabilities, into a class of pensioners to which, under the express language of the law, he does not belong, and therefore in claiming for him pension-ratings to which he is not legally entitled. The doctrine relating to equivalency of disabilities, in ascertaining pensionable rates, is not applicable to permanent specific disabilities which the law definitely describes and for which it distinctly and arbitrarily provides. In this connection, and as clearly explanatory of the grounds upon which the Commissioner rested his action in the case, the following ruling, No. 222, is reproduced:

[Certificate No. 66419.—Oscar Dunlap, Company I, Twenty-sixth Illinois.]

DEPARTMENT OF THE INTERIOR, BUREAU OF PENSIONS,
Washington, D. C., October 15, 1887.

Ruling No. 222.—In this case the application of the claimant for rerating will be allowed at $50 per month from May 25, 1881, the date of the first medical examination under claimant's application of June 26, 1880. The rating is allowed under the act of June 18, 1874, it sufficiently appearing from the evidence in this case that the claimant has lost both a hand and a foot, and at the same time has been so additionally

injured in the head as, from a period prior to the rerating or increase in this case, to render him totally and permanently helpless, requiring from thence until now the regular personal aid and attendance of another person.

The reason why the claimant's rating is not advanced to $72 per month is that he was not, on the 16th of June, 1880, receiving pension at the rate of $50 per month; nor was he entitled to receive a pension of $50 per month at that date, for the reason that, while the degree of helplessness which has been shown was that contemplated by the law, the claimant himself (neither on his own motion nor under the guidance of those who are legally responsible for his actions in this claim) had not made application to be rated in pursuance of the act of June 18, 1874, but, on the contrary thereof, had asked to be rated and had been rated at $36 per month, under the act of February 28, 1877.

Such application for increase was made by him April 30, 1877, and an allowance of $36 was made to him under said application May 24, 1877.

It should be noted that in this application the claimant did not refer to his injuries of head, and only referred to and stated the loss of his hand and his foot, clearly intending to avail himself of the provisions of the act of February 28, 1877.

This was his view, as evidenced by the fact that he received the pension under this certificate without questioning or demur at the rate provided in said act, acquiescing in the decision of the office in the issue of the certificate aforesaid.

It thus appears that the first time at which rating should have been made to the claimant under the act of June 16, 1880, or the acts which it amended, was, as before stated, the date of the filing of his application for increase, dated June 25, 1880; and under the law as now and then existing the earliest date at which rerating and increase could have been allowed him, if at all, under said act, was the date of the first medical examination had after the filing of his application.

The date of this medical examination was May 25, 1881. At that time he should have been rated according to the testimony then on file (which has been greatly strengthened by testimony since added) at the rate of $50 per month, and the failure to do so was manifestly a failure upon the part of the office, and a rerating will be ordered in conformity with this ruling, the Commissioner holding in this case, as in other cases, that, to entitle to the benefits of the act of June 16, 1880, even under the construction given to that act in the case of Whitehead, dated July 12, 1881, by Secretary Kirkwood, there must have been not only the right to pension but that right itself must have been operative by the act of the pensioner asserting his claim.

JOHN C. BLACK,
Commissioner.

(Recorded in vol. 2, p. 136, Commissioner's Rulings.)

The view set forth in the foregoing ruling is approved by the Department as in harmony with the law applicable to the facts in this case. It is apparent therefore that no injustice has been done the claimant. His disabilities have from time to time been properly rated by the Commissioner, whose action in rejecting the present claim for rerating and for increase is hereby affirmed.

MINORS' PENSION—ATTORNEY'S FEE.

MINORS OF JOHN S. SHULTS.

1. Where there are several children entitled to pension, and one of them dies while the claim is pending, the case does not come within the provisions of section 4718 of the Revised Statutes. The word "person" in that section, in its application to the claims of minor children, is understood to embrace *all* the minors. Section 4718 has no application to such a claim so long as any one of those entitled survives.
2. Where there are two or more minors entitled to pension, and one of them dies while the claim is pending, there is no warrant of law for making any deduction from the amount of pension to be paid up to the date of the death of that one. After the death of said minor, the survivor or survivors are entitled to the full amount of pension previously paid.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 9, 1839.

Herewith are returned the papers which accompanied your report of the 21st of December, 1888, upon the appeal of Charles E. Fairman, of this city, from the action of your office in the matter of the fee for the prosecution of the claim of the minors of John S. Shults for pension, No. 248959.

In this case there were four minors entitled to participate in the benefits of the pension. They were, at the time of filing the application, of sufficient age to act for themselves, and agreed with Charles E. Fairman to allow him a fee of $25 upon the successful prosecution of the claim. While the claim was pending one of the applicants died.

The certificate granting the pension was issued on the 10th of November, 1888. A fee of $18.75 was paid to Mr. Fairman. From the action of your office, refusing to allow the full amount of the fee set forth in the articles of agreement, Mr. Fairman appeals.

In the report upon the appeal your office holds that "there being four minors, all of whom signed and executed fee agreements for $25, each of them was chargeable with one-fourth of the contract fee of $25. In the case of the three of them surviving, Martha H., Eliza F., and David N., this sum of $6.25 was deducted from the share of each, making the total fee $18.75, which appellant received. In the case of Graham A., who died, leaving neither widow, nor child under the age of sixteen years, no payment whatever of his share of the pension was made, except so much as was necessary to re-imburse the person who bore the expenses of the last sickness and burial of the decedent, as provided by section 4718, Revised Statutes, and no payment of fee on account of his share of pension was made, for the reason that there is no provision of law under which it can be."

The law granting pension to the minor children of a soldier gives the pension to them jointly. (See Revised Statutes, § 4702). When

there are several children entitled to pension, and one of them dies while the claim is pending, the case does not in any respect come within the provisions of section 4718 of the Revised Statutes. Section 4718 of the Revised Statutes has no application to such a claim, so long as any of those entitled survives.

When there are two or more minors entitled to pension, and one of them dies while the claim is pending, there is no warrant of law for making any deduction from the amount of pension to be paid up to date of the death of that one. After the death of that minor the survivor or survivors are entitled to the full amount of the pension which was previously paid.

On this view of the case, as Mr. Fairman fulfilled his contract to prosecute the claim to a successful issue, there is no reason why he should not be paid the full amount of the fee agreed upon.

You will please, therefore, direct the payment to him of the full amount of the fee set forth in the articles of agreement.

DISLOYAL SERVICE A BAR TO CLAIM.

THOMAS B. BOOTH.

The fact of service in the late "Confederate" army is a bar to the payment of any account, claim, or demand against the United States, which accrued or existed prior to the 13th day of April, 1861, in favor of any person who promoted, encouraged, or in any manner sustained the late rebellion, etc.; nor has the Department any authority to modify these conditions by construing alleged private sentiments of claimant as proof of loyalty whilst engaged in said service.

Assistant Secretary Hawkins to the Commissioner of Pensions, December 10, 1888.

Having considered the evidence contained in the papers which accompanied the case of Thomas B. Booth, son of Richard Booth, late private, Captain Claiborne's company, Virginia Militia, in the war of 1812, on appeal from the action of your office adverse to his claim for bounty land, No. 336760, the said papers are herewith returned to you.

The claimant in this appeal is the only son and the only heir of the late Richard Booth, who served from August 28 to December 1, 1814, (more than fourteen days), in Captain Claiborne's company, Virginia Militia, war of 1812. As such son and heir he asks that a bounty land-warrant be issued to him on account of the military service of his father, and in pursuance of the act of Congress approved March 3, 1855. The act of 1855, to which reference is made, is in the following terms:

Each of the surviving persons specified in the classes enumerated in the following section who has served for a period of not less than fourteen days in any of the

wars in which the United States has been engaged since the year 1790, and prior to 1855, shall be entitled to receive a warrant from the Department of the Interior for 160 acres of land; and where any person so entitled has, prior to the 3d day of March, 1855, received a warrant for any number of acres less than 160, he shall be allowed a warrant for such quantity of land only as will make, in the whole, with what he may have received prior to that date, 160 acres (section 2425, Revised Statutes).

It appears from the records of the Third Auditor that, on the 6th of April, 1852, a bounty land warrant (No. 49756) for 40 acres of land was issued to the deceased soldier (Richard Booth) and sent to his lawful attorney, John Lyon, of Petersburgh, Va. It is apparent, therefore, that, if the claimant in this appeal be entitled to a warrant under the act of 1855, he should be allowed 160 minus 40 acres, as provided in the act. But, in considering this claim, I recall the act of Congress approved March 2, 1867, wherein it is provided that—

It shall be unlawful for any officer to pay any account, claim, or demand against the United States which accrued or existed prior to the 13th day of April, 1861, in favor of any person who promoted, encouraged, or in any manner sustained the late rebellion, or in favor of any one who, during such rebellion, was not known to be opposed thereto and distinctly in favor of its suppression; and no pardon heretofore granted or hereafter to be granted, shall authorize the payment of such account, claim, or demand, until this section is modified, or repealed. * * * (Section 3480, Revised Statutes.)

In view of the foregoing section, the application of the claimant in this appeal was rejected by your office October 12, 1888, on the ground of disloyalty, the evidence in the accompanying papers showing that claimant rendered voluntary service in the late Confederate army. The fact appears to be admitted by claimant himself that he did volunteer in the military service of the late rebellion, but he asserts that such course was the only way of escape that he could take at the time from the prevalent conscription of soldiers for the service; that he was, in fact, opposed to the rebellion itself, and loyal in mind to the Government of the United States. It is evident, however, in the light of the statute of March 2, 1867, that the Department can not determine the mental condition of the claimant at the date of his enlistment in the Confederate army, nor construe the alleged private sentiments of claimant as proof of loyalty whilst he was engaged in the volunteer service of the rebellion. The fact of actual service in the rebellion is paramount in importance to the verbal assertion of loyalty now made in support of this claim; and the Department has no discretionary power whereby the letter of the statute may be modified in the application of it to claimant. The fact of service in the Confederate army is a bar to the claim, and the action of your office in rejecting the application is therefore approved.

SOUNDNESS AT ENLISTMENT.

GEORGE W. BARNES.

The uncertain and conflicting testimony of a single witness, whose memory of events is shown to be untrustworthy, and the impairment of whose mental faculties renders him not only unreliable, but scarcely competent to testify at all, should not be allowed to destroy the presumption of soldier's soundness at enlistment, nor to overthrow the weight of direct and positive evidence of the soldier's freedom from the alleged pensionable disability when he entered the service.

Assistant Secretary Hawkins to the Commissioner of Pensions, December 10, 1888.

Herewith are returned the papers which accompanied your report of November 23, 1888, upon the appeal of George W. Barnes, late private, Company G, First United States Colored Troops, from your action rejecting his claim for pension.

The records of the War Department show that the claiment was drafted July 7, 1864, at Ellicott's Mills, Md. On rolls for March and April, 1865, he is reported "absent sick," with the remark: "Reward paid, $30; assigned to this company March 2, 1865." He was mustered out June 17, 1865, at Goldsborough, N. C., under General Orders No. 37, Headquarters Department North Carolina, May 5, 1865 (a patient in hospital); drafted man; failed to report; arrested as a deserter September 6, 1864, at Washington City, D. C. Company returns for April, 1865, show him "absent, sick, since April 8, 1865;" March 1 1865, regimental headquarters were at Northeast Station, N. C.; March 15, 1865, regiment broke camp and started on march to Goldsborough; March 23, 1865, reached Cox's Crossing; March 28, 1865, marched to Faison's Station, N. C.; March 29, moved to Warsaw Station, N. C.; April 9, returned to Faison's Station; and April 10, took up line of march for Raleigh, N. C.

The charge of desertion appearing upon the above-cited record was removed by the War Department, June 15, 1888, as having been erroneously made.

The claimant filed declaration for pension, June 4, 1880, alleging as the basis of his claim that, on march from Fort Fisher to Raleigh, N. C., in the spring of 1865, he was injured and crippled from his shoe galling his right foot, said injury since developing into cancer; and that he was treated for said injury in the regimental hospital at Goldsborough, N. C.

The claim was specially investigated, and, after due consideration of the testimony thus obtained, was rejected, upon the ground that the claimant's disability existed prior to his enlistment, the few days of his active service in the spring in the mild climate of North Carolina not being deemed sufficient to cause the severe disability now existing or to have substantially aggravated the same. Subsequently the claim-

ant filed additional evidence, and the claim was re-opened and subjected to further special examination, with a view to ascertaining the credibility of the evidence of prior unsoundness upon which it had been formerly rejected. Upon consideration of the testimony thus obtained, you adhered to your former action of rejection, November 14, 1888, upon the same ground. From said action the claimant appealed to the Department, November 19, 1888, contending that he is shown by the evidence on file to have been entirely sound and healthy when taken into the service, that his disability is proved to be the result of his military service, and that it has continued to increase in severity to the present time.

OPINION.

The claim having been rejected by you upon the ground alone that the alleged disability of the appellant existed prior to his military service, it will be necessary to discuss the question of origin only, in the consideration of this appeal.

The evidence on file fully corroborates the allegations of the appellant as to the existence of some injury or affection of his right foot in the service, and tends to sustain his allegations as to the injury of said foot by having been rubbed and galled by his shoe upon a march to Raleigh, N. C., in the spring of 1865, to which injury he ascribes his present disability. The continuance of the alleged disability of right foot and leg from the date of discharge, its gradual and constant increase in severity, and the serious character it assumed, until it has reduced the appellant to the deplorable condition he presents at the present time, has also been clearly and satisfactorily established by the evidence.

The medical board of your office, in an able and exhaustive opinion, which was personally considered by the medical referee and approved and indorsed by him, holds that, if the prior soundness of the appellant be accepted as sufficiently and legally established, then, the cause alleged as originating in the service is the only existing cause of appellant's disability, as shown by the evidence—the medical referee adding: "And it can not but be admitted that what was at first a simple inflammatory state might have resulted in the present diseased condition of the foot. We have evidence of an exciting cause during army service, which we are, upon the evidence in the case and from a purely medical stand-point, bound to admit as the actual cause of the diseased condition of the foot."

It is thus evident that the only question left open in appellant's claim, and concerning which a reasonable doubt could exist, is as to the origin of the alleged disability of foot and whether it was caused by the circumstances detailed by appellant as occurring in his army service, or resulted from some injury to said foot previously incurred, and which was merely aggravated and rendered more apparent by said service.

The theory of prior unsoundness, upon which you reject this claim rests wholly upon the testimony of one witness, the father of the appellant, who makes the only positive and direct statements tending to show that the appellant's foot was injured prior to his being drafted in the Army. This witness stated, in his testimony before a special examiner, that his son's (the appellant's) foot had been injured and made sore by his shoe or boot rubbing it *before* he was drafted and entered the service. Subsequently, and after the first rejection of this claim, he made an affidavit retracting these statements, saying that he was mistaken as to the time of the injury to his son's foot, and that it was not until *after* the son had been discharged that he knew of it.

It appearing that this witness was very old and infirm, the depositions of the two persons who attested his signature to his former examination, as well as of two neighbors who had known him intimately for many years, were taken by a special examiner of your office, with a view of testing the credibility of his statements and his competency to testify from memory.

Three of these witnesses are reported to be men of most respectable standing and of excellent character. They all appear to be white men of intelligence and respectability, possessed of a thorough knowledge of the characteristics of appellant's father, and as having had ample opportunities for acquiring such knowledge. They all agree in their testimony that the mental faculties of said witness have been greatly impaired by old age and the infirmities incident thereto; that he is in the neighborhood of 85 or 86 years of age; has to a greater or less extent lost the power of remembering events with any degree of accuracy and is evidently in his dotage; that he is an honest, simple-minded old man, who would not willfully state an untruth, but whose present mental condition renders his statements concerning past events wholly unreliable, as he has not capacity sufficient to discriminate as to dates and facts, nor to arrive at a correct conclusion as to matters involving his recollection.

On the other hand, it is to be considered that the record shows that this appellant did not voluntarily enter the military service, nor exhibit any desire or willingness to join the Army, but that he was drafted, failed to report, was arrested, and sent under guard to join his command. The presumption arising from these circumstance is very strong that, had any physical defect existed at that time which would have had a tendency to exempt or to relieve him from such evidently enforced military duty, it would have been made known by appellant, or discovered upon the examination to which it appears he was subjected; and such presumption could not reasonably be rebutted nor overthrown except upon competent evidence, clearly showing the contrary, and by witnesses whose credibility was unquestioned. This presumption is sustained in this case by the uncontradicted testimony of numerous witnesses, the majority of whom are reported to be of good character and

reputation, and who swear, more or less positively, to the prior soundness of the appellant—to his freedom from any injury or disease of either the right foot or ankle prior to his joining the Army. Some of these witnesses appear to have sojourned and worked with the appellant, immediately prior to his being sent to join his command, under circumstances which afforded them peculiar advantages and opportunities for observing any such defect or injury to appellant's foot, and which render it difficult to conceive how it would have been possible for them not to observe it, had such injury existed at that time, as first testified to by the appellant's father.

In view of the evidence above indicated, the Department is clearly of the opinion that the uncertain and conflicting testimony of a single witness whose memory of events is shown to be untrustworthy, and the impairment of whose mental faculties renders him not only unreliable, but scarcely competent to testify at all, should not be permitted to overthrow the overwhelming weight of evidence in this claim in favor of the prior soundness of the appellant, and of his freedom from the disability alleged, when he entered the service.

This being the only point at issue, the evidence being deemed sufficient to establish the prior soundness of the appellant and the origin of his alleged disability in the service and line of duty, it follows that the appeal herein will be sustained. You are directed, therefore, to admit the claim of appellant, placing his name upon the pension rolls at such rate of pension as may be deemed commensurate with the degree of his disability as shown to exist, and in accordance with the rules and regulations of your office.

NEW EVIDENCE - RECONSIDERATION.

ROBERT HIRSCH.

The ruling re-affirmed, viz, that, "after a claim has been rejected by the Commissioner of Pensions, and on appeal decided adversely by the Department, a reconsideration of the same upon a second appeal to the Department is justified upon the ground only that in the former decision a manifest error was committed, or that new, material, and important evidence, such as would have warranted a favorable decision in the first instance, is produced by claimant—new, material, and important evidence, which, as it may appear, claimant had failed to procure, even at the expense of proper diligence."

Assistant-Secretary Hawkins to the Commissioner of Pensions, November 10, 1888.

Herewith are returned the papers which accompanied your supplemental report of October 31, 1888, upon the appeal of Robert Hirsch, late musician, Company A, Twenty-seventh Pennsylvania Volunteers, from your action rejecting his claim for pension.

Claimant enlisted May 5, 1861, and was discharged September 8, 1861. He filed his claim for pension July 21, 1879, alleging that, at the battle of Bull Run, Va., July 21, 1861, when the retreat was ordered, he had

to march all night in the rain, and contracted a severe pain in the left side, resulting in heart disease, for which he claims pension. He was discharged from the service upon a certificate of disability, in which it was stated by the surgeon that he had "disease of the heart; he has been laboring some years since under palpitation of the heart." The records of the War Department furnish no other information on the subject.

Claimant was medically examined by the board of surgeons at Philadelphia, Pa., December 15, 1880, who certify:

Alleges heart disease and severe precordial pains. The apex beat is rather forcible, but can not say has hypertrophy. The organ shows no signs of positive disease. Alleges palpitation. Applicant has well-marked *arcus sinilis*, and no doubt there is some fatty degeneration of the heart. This man is weak, anæmic, and evidently broken down. It is impossible to say as to *origin* of the disease, but if incident to service would rate at one-half.

Claimant was again examined by the board of surgeons at the same place (Philadelphia), January 31, 1883, who certify:

Applicant is a poorly-nourished, uncleanly old man. Has marked *arcus sinilis* in both eyes. Heart normal. Respiration not abnormal. Alleges hypo-gastric tenderness, which has been probably induced as much by his occupation as a shoemaker as by his eight months' service in the field.

The board rate him nothing for the disability alleged.

The claim was rejected March 27, 1884, on the ground that the disability upon which the same was based was shown by the record to have existed prior to the appellant's enlistment; and, upon appeal to the Department, said action of rejection was affirmed July 23, 1885.

Since the date of said departmental action, the claim appears to have been re-opened by you, and evidence filed by the claimant tending to show that he was sound at enlistment, and that he incurred his alleged disability in the service, which evidence was deemed by you not sufficient to overcome the former action of rejection, and the same was accordingly adhered to.

From this action the claimant again appealed to the Department, September 10, 1888, contending that the evidence filed since the last departmental action in this claim was sufficient to entitle the same to a reconsideration, to favorable action, and to its allowance.

OPINION.

It is stated in your report herein that you refuse to reconsider this claim for the reason that the point at issue therein is *res adjudicata*, under the decision upon the former appeal to the Secretary of the Department.

The rule with regard to *res adjudicata*, and the extent to which it will be applied in the consideration of pension claims, has been laid down by the Department in numerous decisions, and is as follows:

After a claim has been rejected by the Commissioner of Pensions and, on appeal, decided adversely by the Department, a reconsideration of the same upon a second

appeal to the Department is justified upon the ground only that in the former decision a manifest error was committed, or that new, material, and important evidence, such as would have warranted a favorable decision in the first instance, is produced by claimant -new, material, and important evidence which, as it may appear, claimant had failed to procure, even at the expense of proper diligence. (See cases of Tyner, Noah N., 1 Pension Decisions, page 21; Hoyt, Birney, *Id.*, page 70; Jones, Roland M., *Id.*, page 162; Gordon, Morgan, *Id.*, page 188; Swartz, John, 2 Pension Decisions, page 3; Mullen, Chambers C., *Id.*, page 18; Colner, Edward A., *Id.*, page 21; Gleason, John H., *Id.*, page 106; Lake, Ann Eliza, widow of Louis S., *Id.*, page 111; Newton, George S., *Id.*, page 144.)

The position taken by you in this claim under the aforesaid departmental decision is unquestionably correct, so far as your action is concerned; but, the claim having reached the Department upon appeal, the evidence filed since said departmental action will be now considered with reference to whether it can be deemed sufficient to overturn said action in the light of the rule above stated.

An examination of the former departmental decision makes it appear that your action of rejection had been affirmed at that time, not so much upon the ground that the record contained in the certificate of disability shows that the disability upon which the claim was based existed prior to appellant's enlistment, as that the evidence on file at that time was deemed by the Department insufficient to show that the alleged disability *originated* in the service and line of duty. It appears that the surgeon who prepared and signed the certificate of disability had made several contradictory statements with reference to the appellant's condition at that time, and that he himself examined him at the date of his enlistment and passed him as a sound, able-bodied man, qualified to enter the service as a soldier.

The appellant appears, after said action of rejection, to have made application to the War Department for a correction of the record, to show soundness at enlistment; and it further appears that, under said application, you were called upon by the War Department for the evidence on file in your office in support of his claim for consideration in the matter of said application, and on November 21, 1887, the Adjutant-General of the Army communicated to you that the Surgeon-General, to whom said evidence and the aforesaid application of appellant had been referred for his opinion, reported, under date November 12, 1887, as follows:

From the evidence submitted I am of the opinion that the within-named man had no organic disease of the heart at the time of his first enlistment, nor at the date of his discharge, September 8, 1861, nor at the date of his re-enlistment in the Ninety-eighth Regiment of Pennsylvania Volunteers, and that, therefore, a change of record is warranted as requested.

In addition to the above the appellant has filed the affidavits of the steward of the hospital to which he claims he was sent with said disease of heart, as well as those of the colonel of his regiment and of several comrades, all of whom testify to his prior soundness, to the incurrence of the alleged disability in the service as claimed by appellant, *and to treatment therefor* in the service by the surgeon of his regiment.

The difficulty that presents itself is, that, in view of the present decisions of the Department, and of the weight which is given to the statements contained in the certificate of disability upon which the appellant was discharged, as a contemporaneous official record, the subsequent statements of the surgeon, made many years afterwards, can not be accepted to contradict it, nor will the statements of his officers and comrades, given under like circumstances, be taken as sufficient for that purpose in the absence of any evidence of fraud or of mistake in the making of said certificate. Besides all this, it is apparent that the opinion of the Surgeon-General of the Army, upon the application of the appellant for a change of the official record, is fatal to his claim, for it is held by that officer that the appellant was free from the alleged disability, not only at enlistment, but during the whole time of his service, and at discharge.

It further appears that the appellant enlisted a second time in 1862 and served until 1865, when he was mustered out of his second service with his command, and that no hospital record nor other evidence of medical treatment, nor any other evidence showing the existence of the alleged disability, appears in his second service.

All these facts and circumstances taken together warrant the Department in holding that the evidence filed in this claim since the former action of rejection is not sufficient, under the rules with reference to *res adjudicata*, as above stated, to warrant either a modification of the same, or a reconsideration of said former departmental decision; and, therefore, your action declining to re-open this claim or to disturb said former action of rejection is affirmed.

DEPENDENT FATHER.

DAVID REES.

1. In order to entitle the appellant to pension as a dependent father, it must be shown that, at the date of soldier's death, appellant had "no other adequate means of support than the contributions of his son, or of any other person not legally bound to aid in his support, and that he was unable to derive from his own actual or possible manual labor sufficient income" for an adequate support.
2. A pension granted to a dependent father can not be paid except during such period as the evidence shows it to be actually necessary for adequate subsistence.

First Assistant Secretary Muldrow to the Commissioner of Pensions, December 7, 1888.

Herewith are returned the papers which accompanied your report of October 19, 1888, upon the appeal of David Rees, father of Thomas Rees, deceased, late private Company C, Sixty-first New York Volunteers, from your action rejecting his claim for pension.

The records of the War Department show that the soldier was enrolled October 14, 1861, for three years, and that he died in the service, May 9, 1862, in hospital at Washington, D. C.

The claimant filed his declaration for pension as dependent father of the soldier, April 21, 1879, alleging therein that, at the time of the soldier's death, he was in part dependent upon him for support, and that said soldier left neither widow, nor child under sixteen years of age, surviving him. The evidence on file shows that the soldier was unmarried, and that his mother had died September 7, 1884.

Under direction of your office the claimant was medically examined by a single surgeon at Rome, N. Y., with a view to determining his physical condition and his capacity to perform labor. The certificate of said examination shows that his hearing was defective, but no evidence of disease was detected, except constipation; stiff in movements, but no evidence of rheumatism; sixty-eight years old; weight, 138 pounds. In the opinion of the examining surgeon his present disability has existed for the past three years; before that, he was disabled for five years one-half of present degree, and prior to that he was but slightly disabled, if at all.

The evidence filed in support of the declaration being deemed unsatisfactory, the claim was subjected to a special investigation in the field to determine the value of the testimony on file and to obtain such further testimony as might be possible touching the merits of the claim.

After due consideration of the testimony thus obtained the claim was rejected April 7, 1883, upon the ground of non-dependence.

From said action of rejection, the claimant appealed to the Department September 22, 1888, contending that the rejection of his said claim was "wrong, erroneous, and unjust," and that it was due in part, as claimant thinks, to malicious parties who had written prejudicial letters to the Pension Office.

OPINION.

In order to entitle the appellant to a pension as the dependent father of the deceased soldier, for which he makes this claim, it is necessary that several prerequisite conditions should appear affirmatively from the evidence on file.

It must be shown that at the date of the death of the soldier the father had no other adequate means of support than the contributions of his son, "or of any other person not legally bound to aid" in his support, and that he was unable to derive from his own actual or possible manual labor sufficient income to furnish him means of adequate support; and furthermore, such pension, even if granted, can not be paid except during such period as the evidence may show it to be actually necessary as a means of adequate subsistence. (Section 4707, Revised Statutes of United States.)

When the evidence on file in support of this claim is examined with reference to the above-recited requirements of the law, it becomes apparent that the appellant has failed to make out such a case of dependence upon the soldier at the time of his death as is essential to the grant *of a pension* under the statute governing such cases.

The evidence shows that at said date the appellant was in fair health, was able to work, and did work at his trade as a blacksmith; that he supported his family with the proceeds of his labor and the business of his blacksmith shop in comparative comfort. It also appears that he had at the same time the assistance of two sons younger than the soldier, one seventeen and the other fifteen years of age, to a more or less extent; and, while it is shown that the soldier contributed a portion of the proceeds of his labor to the support of appellant and his family prior to his enlistment, it does not appear that such contributions were actually necessary to the appellant as a means of adequate subsistence.

While there is evidence that the appellant has not been a man of robust health at all times, and that he has been treated for various diseases at different times from the year 1862 to the present time, yet it is clearly shown by the same testimony that his disability has never been such as to prevent his acquiring a sufficient income from his trade to provide himself and family with an independent support. It is beyond dispute that the appellant is, at the present time, the owner of a house and lot worth from $600 to $1,000, has a little money ahead, is completely out of debt, and, so far from being in a needy or destitute condition, is in comparatively comfortable circumstances.

For the above reasons the Department is of the opinion that appellant has failed to establish such a condition of dependence upon the soldier at the time of his death as would warrant the allowance of his claim for pension as a dependent father; and your action rejecting said claim is accordingly affirmed.

SERVICE PENSION—MEXICAN WAR.

THEODORE J. ECKERSON. (*Motion for review.*)

Upon a motion for review, filed by the Commissioner of Pensions, the Secretary of the Interior construes the act of January 29, 1887, and reaffirms the ruling of the Assistant Secretary in the case of Thomas J. Eckerson (vol 2, P. D., p. 187). Under said act, "there is no opportunity to consider the service pension as an invalid pension."

Secretary Vilas to the Commissioner of Pensions, December 27, 1888.

I have considered your letter of November 14, 1888, in reference to the case of Theodore J. Eckerson, in which you desire a review of the decision of the Department, made by the Assistant Secretary, whereby it was determined that, although Eckerson is upon the retired list of the United States Army, he is entitled to the pension granted by the act of January 9, 1887, to the surviving soldiers of the Mexican war in consideration of their military service therein. The point is a very simple one. The act of 1887 grants the pension, without exception, to all such soldiers of the Mexican war. Section 4724 of the Revised

Statutes, upon which I understand you to rely, provides only that no person in the Army, which includes the retired list, shall also have his pay and "a pension as an invalid." There is no opportunity to consider the service pension as an invalid pension. Hence the questions which you put in your communication have no relation to the case in hand, as it is necessarily to be decided by the Department. If the law grants Eckerson a pension, it is for Congress to determine the considerations which you forcibly mention. I see no reason for altering the decision of the Assistant Secretary.

RES ADJUDICATA—RE-ADJUSTMENT OF RATINGS

WALLACE G. BONE.

1. The rule of *res adjudicata*, as applied by the Department, was stated in the case of Tyner Noah, N. (P. D. Vol. I, p. 21) as follows: "It has uniformly refused to disturb an adjudication of a claim by a former administration, except upon the most conclusive evidence that error has been committed. When the question as to the propriety of a given rating is one of judgment merely, depending upon the weight of evidence, it will not allow the opinion of to-day to overturn the opinion of yesterday. But where the incorrectness of the former action is so manifest upon a review of the evidence that it is not a matter of dispute, the Department will not refuse to do justice because the error is of long standing and has been sanctioned by subsequent action."

Section 4744 of the Revised Statutes, defining the jurisdiction of the Commissioner of Pensions, authorizes him to detail from time to time clerks or persons employed in his office to make special examinations into the merits of such pension, or bounty land claims, whether pending or adjudicated, as he may deem proper, and to aid in the prosecution of any party appearing on such examinations to be guilty of fraud, etc.; and the act of Congress approved June 21, 1879, directs that "the Commissioner of Pensions shall have the same power as heretofore to order special examinations whenever, in his judgment, the same may be necessary, and to increase or reduce the pension according to right and justice; but in no case shall a pension be withdrawn or reduced except upon notice to the pensioner and a hearing upon sworn testimony, except as to the certificate of the examining surgeon."

Assistant Secretary Hawkins to the Commissioner of Pensions, December 29, 1888.

The attention of the Department has been called by your communication of March 23, 1888, to the invalid pension claim, certificate No. 24155 of Wallace G. Bone, late corporal, Company D, Seventh Illinois Cavalry.

You transmit the papers in said claim and request the consideration of the question of the right of the said pensioner to continue to receive pension at the rate at which he is now borne upon the rolls, namely, $12 per month, in accordance with departmental decision dated February 18, 1885, in view of the results of the recent special examination of *said claim*, and the evidence thereby adduced.

It appears that the pensioner first applied for pension in April, 1863, which was granted in February, 1864, at the rate of $6 per month from March 3, 1863, the date of his discharge from the service, for disability resulting from gunshot wound of right arm near the shoulder joint, received in the battle of Coffeeville, Miss., December 5, 1862. His pension was subsequently increased to $15 per month from November 17, 1871, the date of the examining surgeon's certificate, rating him "total third grade," and to $18 per month under the act of Congress approved June 8, 1872.

On May 4, 1874, pensioner filed an application for increase of pension, alleging that his injuries, for which pensioned, had resulted in permanent total helplessness, requiring the regular aid and attendance of another person, and asking to be pensioned under the provisions of section 4 of the act of March 3, 1873, at $31.25 per month, as therein provided for the disability alleged. Upon said application, his pension was increased to $31.25 from May 23, 1874, based upon the certificate of the examining surgeon of this city, filed May 22, 1874, in which it is stated that "pensioner evidently suffers from severe nervous prostration, says he has frequent convulsions, caused by severe pain, and, from what I can learn of him, this is probably the case. If he suffers as he states, he requires the regular aid and attendance of another person;" and also, upon an unsworn statement, dated May 16, 1874, of Dr. Barnes, of this city, as follows:

> Since receiving his wound, he has been operated on five times, the last operation being performed by Dr. N. S. Lincoln and myself. As a natural consequence of these operations, the pensioner's nervous system is very much shattered; so much so, indeed, that large quantities of morphia have to be administered to him hypodermically, to give him relief from pain, and enable him to sleep. Before the last operation, and in fact the first time I was called to see him, the pain was so great that it had thrown him into convulsions. Dr. Lincoln and myself have but little hope that our surgical interference will be of any permanent good to him, and doubt if anything short of the removal of the arm, or some other capital operation, will ever restore him to health. In his present condition, he is not able to take care of himself and needs constant attention and care.

In August, 1883, the rate of pension was reduced to $24 per month, under the act of March 3, 1883, upon the recommendation of the then medical referee of your office, based upon the certificate of medical examination, dated April 25, 1883, by the board of surgeons of this city. This board found an open ulcer, communicating with dead bone, etc.; disability equal to loss of hand or foot, but not, in their opinion, incapacitating him for performing any manual labor; and pensioner informed the board that he had had no convulsions for nearly two years past.

Subsequently, the pensioner appealed from said action reducing his rate of pension, contending that it was erroneous, and claiming that he was entitled to the successive rates of pension provided by the acts of March 3, 1873, June 18, 1874, and June 16, 1883, for a condition of "total and permanent helplessness requiring the regular aid and attendance

of another person." Said appeal was considered by the Department, and, on February 18, 1885, a decision thereon was rendered by the honorable Secretary of the Interior reversing said action of the Commissioner of Pensions reducing said pension, and directing a rerating of the pension in the following terms:

It is believed that the condition of appellant has been such as to entitle him to the provisions of the law for a disability which requires regular aid and attendance since June 6, 1866. The case is returned for an adjustment of his pension accordingly.

In accordance with said departmental decision, a certificate was issued to pensioner on March 2, 1885, for gunshot wound of right shoulder, allowing a rerating at $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874, and $72 per month from June 17, 1878, deducting subsequent payments.

On December 19, 1887, the papers were referred by you to the special examination division of your Bureau, for a careful and thorough examination as to the physical condition of pensioner from June 4, 1874, to the present time, in order to determine whether there has existed such a degree of permanent disability, requiring personal aid and attendance, as would entitle the pensioner to his present rate of pension, viz: $72 per month. The required notice having been served on the pensioner, said investigation was proceeded with in the usual manner by one of the special examiners of your Bureau, and a large amount of testimony adduced thereby, tending to show that the degree of disability for which pensioner was rated did not exist at the present time, and had not existed since the date of the former action of your office.

In connection with said special investigation, the pensioner was again subjected to a medical examination by the board of examining surgeons, of this city, who reported, in a certificate dated January 7, 1888, that a total disability does not exist in the right arm or hand, and he does not require the regular aid and attendance of another person; that there is a constant purulent discharge, not of large quantity, from the wound, but that he can assist in dressing and undressing himself, and in eating with the right hand, etc.; and they rate him 16–18.

Upon the report of the special examiner in charge of said investigation, returning the testimony obtained by him, and the consideration of the same by you, it appears that, as required by law, you notified the pensioner that you proposed to take action looking to a reduction of the rate of pension he had been receiving since the rendition of the departmental decision aforesaid, and fixed Wednesday, March 21, 1888, for him to be heard upon the proposed action. He appeared upon said day, by his attorney, and objected to any action being taken or to further proceedings in the matter of his pension, contending that the Bureau of Pensions had no jurisdiction to either examine into or disturb his pension, for the reason that his disability had been finally determined to be that of "total and permanent helplessness" requiring the regular aid and attendance of another person, that his rate of pension

therefor was fixed by departmental decision and was *res adjudicata*, and citing in support of his position the various decisions of the Department upon said subject—particularly the recent decision rendered in the case of Colnor, Edward A. (II P. D., p. 21).

You thereupon declined to proceed further in said matter, and certified the whole case with all the papers to the Department, for its consideration, to determine the questions raised by the pensioner as aforesaid, and also his right to be borne upon the pension rolls at the rate of pension he is now receiving under said departmental decision of February 18, 1885.

This case presents two questions for determination by the Department:

First. Was the effect of the departmental decision of February 18, 1885, such as to render all questions relating to the extent and severity of pensioner's disability, and to his rate of pension therefor, *res adjudicata*, so as to preclude a subsequent review of said matters and a reopening of the case by the Department?

Second. Has the Commissioner of Pensions jurisdiction, at any time subsequent to the rendition of said departmental decision, to investigate or to inquire into the present *status* of said pensioner, or into the merits of his claim, and to re-adjust and change the rate of his pension in accordance with the results of said investigation?

As to the first question, the position of the Department has been very clearly and well stated in the leading case of Tyner, Noah N. (I P. D., p. 21), as follows:

> The views of the Department on the subject of rerating have been frequently stated. It has uniformly refused to disturb an adjudication of a claim by a former administration, except upon the most conclusive evidence that error has been committed. When the question as to the propriety of a given rating is one of judgment merely, depending upon the weight of evidence, it will not allow the opinion of to-day to overturn the opinion of yesterday. But where the incorrectness of the former action is so manifest upon a review of the evidence that it is not a matter of dispute, the Department will not refuse to do justice because the error is of long standing and has been sanctioned by subsequent action. (See also Coleman, James S., Ct. No. 122067; Teller, H. M., Secretary, June 16, 1884, Digest 1885, p. 423, sec. 9, rerating.)

The above-cited ruling plainly indicates the extent of the application of the rule of *res adjudicata* in the adjudication of pension claims by a former administration, and under what circumstances and in what cases a departmental adjudication will be reviewed and modified by subsequent departmental action; and this rule will be found to have been followed by, and to be consistent with, all subsequent decisions of the Department upon this point. The Department will not disturb former adjudications for slight or trivial reasons, nor upon a mere matter of opinion as to the weight of evidence, nor upon a matter involving merely an exercise of judgment or discretion; but, in order to justify

such action, glaring error, mistake, or manifest injustice must be made apparent from a review of the record and of the evidence.

In the case under consideration it is apparent at the outset that such glaring error was committed in the rerating of the pensioner, under the departmental decision of February 18, 1885, as would justify the Department in re-opening said matter and correcting said error, with a view to bringing said departmental decision directly within the purview of the rule above cited.

Purporting to be acting under the directions contained in said decision, and to be guided thereby, we find that the pensioner was rerated for "permanent and total helplessness requiring the regular aid and attendance of another person," from June 6, 1866, as follows: twenty-five dollars per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874, and $72 per month from June 17, 1878. The language of the departmental decision authorizing and directing the above rerating (as hereinbefore quoted) is as follows:

> It is believed that the condition of appellant has been such as to entitle him to the provisions of the law for a disability which requires regular aid and attendance since June 6, 1866. The case is returned for an adjustment of his pension accordingly.

The act of June 16, 1880, under and by virtue of which the pensioner was rated at $72 per month, provides—

> That all soldiers and sailors who are now receiving a pension of fifty dollars per month, etc., * * * shall receive, in lieu of all pensions now paid them, etc., * * * the sum of seventy-two dollars per month.

The above act has been uniformly construed by the Department to be applicable, as its language plainly indicates, to those pensioners only who were, at the date of its passage, in receipt of a pension of $50 per month for a disability resulting in "permanent and total helplessness requiring the regular aid and attendance of another person," under the act of June 18, 1874; and this construction was extended to include, also, all those whose applications for pension under said act of June 18, 1874, were pending at said date, and to no others. (See Digest, 1885, p. 253, and cases there cited; Jones, Rowland M., I P. D., p. 162; Hanvey, Jas. B., *Id.*, p. 216; Mandeville, Wooster, *Id.*, p. 397.) As has been heretofore stated, the pensioner was, prior to said departmental decision, never in receipt of a pension of $50 per month, nor had he ever filed a declaration for increase of pension under the act of June 18, 1874. He was borne on the rolls at the rate of $31.25 per month, under the provisions of section 4 of the act of March 3, 1873, up to June 7, 1883, at which time his pension was reduced by the action of the Commissioner of Pensions to $24 per month, under act of March 3, 1883. From this action he appealed to the Department, February 7, 1885, and in his affidavit for an appeal he, for the first time, asserted and claimed an increase of pension under the acts of June 18, 1874, and June 16, 1883, providing for pension at the rate of $50 per month and $72 per month, respect-

ively. It is thus apparent that, even if his said affidavit for an appeal could have been considered sufficient as an informal declaration for increase under said acts, he would not have been entitled to the rate of $72 per month under the law, and the rulings of either the Commissioner of Pensions or of the Department at that date, the only paper ever filed by him, asserting such claim, having been filed long *subsequent* to the passage of said act of June 16, 1880. Hence it is evident that the language of said departmental decision, above quoted, did not authorize the rating of the pension at $72 per month under the act of June 16, 1880, since the construction of said act by the Department itself did not "entitle him to the provisions of law" therein contained. The Department is, therefore, clearly of the opinion that said rating of $72 per month was erroneous, being authorized neither by law nor by said departmental decision, and that it is such an error as could and should be corrected by subsequent action, and for the perpetuation of which the rule of *res adjudicata*, as above defined, can not be invoked.

As to whether the Department will proceed further and review the remaining action had under said departmental decision in re-rating pension for "permanent and total helplessness, requiring the regular aid and attendance of another person" from June 6, 1866, is a proposition somewhat involved in doubt. It is apparent, however, upon a review of the evidence upon which said departmental action was based, that the conclusion arrived at must have been founded upon very different views and principles from those which controlled in the adjudication of analogous cases at the same period, and it appears to be in direct conflict with the published rulings of the Department at the time.

The pensioner appears to have been first placed in the class of those pensioners whose disability was one of "permanent and total helplessness, requiring the regular aid and attendance of another person," upon the certificate of an examining surgeon, very guarded in its terms, which describes such a condition as existing, not from any objective symptoms discovered by him upon said examination, nor as his own professional opinion, but from statements made to him by pensioner, and says: "If he suffers as the states, he requires the regular aid and attendance of another person;" and also upon the unsworn statement of a physician of this city who states that, at that date, May 16, 1874, "In his present condition he is not able to take care of himself, and needs constant attention and care." The subsequent departmental action upon pensioner's appeal from the action of the Commissioner of Pensions was held in the teeth of, and in conflict with, the opinion of the medical referee, and the recommendations contained in the certificates of thirteen medical examinations, extending from September 7, 1874, to April 25, 1883, inclusive, by no one of which was he rated above $24 per month. Under these circumstances the Department is inclined to the view that the gross inconsistencies involved in the former adjudication of this pension, as disclosed by a review of the evidence upon which it was

based, would bring it within the rule as held in the case of Tyner, *supra*, and present a case in which justice to other deserving claimants, and an equitable administration of the pension laws, would demand that it be now re-opened and properly adjusted by the Department. Whatever errors were then committed have now, however, passed beyond recall, and it is not deemed advisable to even appear to disturb the principle that the Department will not reconsider matters already adjudicated upon a mere question of opinion, or the weight of evidence, especially in this case where the only vital issue presented—the present authority and jurisdiction of the Commissioner of Pensions to change the rate of pension fixed by said departmental decision—is directly involved in, and to be determined by, the discussion of the second question, as hereinbefore stated.

The second question relates to the effect of said departmental decision upon the jurisdiction of the Commissioner of Pensions to inquire into the merits of pensioner's claim at the present time, to investigate his present status and physical condition, and to re-adjust and change the rate of his pension, or to disturb or meddle with his pension in any manner.

The pensioner, by his attorney, contends, with great earnestness and ability, that the effect of said departmental decision was to render all such matters *res adjudicata*, depriving the Commissioner of all jurisdiction in the premises; and he cites in support of his position the various decisions of the Department upon the subject of *res adjudicata*.

The question here is, has the Commissioner jurisdiction to investigate the present condition of the pensioner and to adjust his rate of pension so as to make it commensurate with his disability as indicated by the evidence at this date? Such jurisdiction has unquestionably been conferred upon him by statute. In the first statutory provision upon this subject, found in section 474 of the Revised Statutes, it is provided:

> The Commissioner of Pensions is authorized to detail, from time to time, any of the clerks in his office to investigate any *suspected attempts to defraud* the United States in or affecting the administration of any law relative to pensions, and to aid in prosecuting any person implicated, etc.

Again, in section 4744, Revised Statutes, we find in almost identical terms with the foregoing:

> The Commissioner of Pensions is authorized to detail, from time to time, clerks in his office to investigate suspected attempts at fraud on the Government through and by virtue of the provisions of the pension law, and to aid in prosecuting any person so offending, etc.

These statutes clearly give the Commissioner the jurisdiction to investigate any case in which there is a suspected attempt to commit fraud, but appear to limit his authority to order such investigation, to such cases alone; and there is nothing contained in these provisions clearly indicating his right to so do, except in pending cases. Congress, evidently recognizing the fact that the basis upon which pensions are granted is of a variable and changeable nature, liable to increase or de-

crease with the lapse of time, or to entirely disappear, and that it was necessary for the just administration of the pension laws to invest the Commissioner of Pensions with a discretionary power to investigate all cases, at any time, in order to ascertain whether the rate of pension was commensurate with the degree of pensionable disability existing, amended said above quoted section 4744, Revised Statutes, by the act approved July 25, 1882, broadening and extending the powers of the Commissioner in this respect, as follows:

That section 4744, title 57, of the Revised Statutes of the United States is hereby amended to read as follows:

"SEC. 4744. The Commissioner of Pensions is authorized to detail from time to time clerks or persons employed in his office to make special examinations into the merits of such pension or bounty land claims, whether pending or adjudicated, as he may deem proper, and to aid in the prosecution of any party appearing on such examinations to be guilty of fraud," etc.

This amendment gives to the Commissioner the widest and broadest discretion to order an investigation into the merits of all cases, "whether pending or adjudicated;" and it is idle to contend that such discretion is limited to cases in which fraud is charged or suspected, and for the sole purpose of its discovery, since we have seen that the former statutes, which this amends, gave to the Commissioner ample powers for such purpose, and that this amendment expressly extends his jurisdiction to investigate as to the merits of all cases, whether pending or adjudicated. for all purposes for which he may require information.

The only limitation upon the above-enumerated powers of the Commissioner is to be found in section 4720, Revised Statutes of the United States, which is as follows:

SEC. 4720. When the rate, commencement, and duration of a pension allowed by special act are fixed by such act, they shall not be subject to be varied by the provisions and limitations of the general pension laws; but, when not thus fixed, the rate and continuance of the pension shall be subject to variation in accordance with the general laws, and its commencement shall date from the passage of the special act, and the Commissioner of Pensions shall, upon satisfactory evidence that fraud was perpetrated in obtaining such special act, suspend payment thereupon until the propriety of repealing the same can be considered by Congress.

It will be observed that the foregoing limitation of the power of the Commissioner is expressly restricted to cases wherein pension is allowed by special act, which definitely fixes the rate, commencement, and duration of the pension thereby granted; and the latter part of said section is in furtherance of the views, and fully sustains the position now taken by the Department as to the Commissioner's powers of investigation into the merits of all other cases.

Having thus seen that the jurisdiction of the Commissioner to investigate and examine into the merits of any claim, whether adjudicated or not, is clearly established and granted by statute, what use can he make of the information thus obtained in the case of a claim that has been adjudicated?

For an answer to this question, we have only to turn to the act of Congress, approved June 21, 1879, repealing sections 4771, 4772, 4773 of the Revised Statutes, and which act is as follows:

That the Commissioner of Pensions shall have the same power as heretofore to order special examinations whenever, in his judgment, the same may be necessary, and to increase or reduce the pension according to right and justice; but in no case shall a pension be withdrawn or reduced except upon notice to the pensioner and a hearing upon sworn testimony, except as to the certificate of the examining surgeon.

The sections of the Revised Statutes repealed by the above act provided for biennial medical examinations of all pensioners, except in cases of permanent disabilities which could not from their nature be subject to change, and that their rate of pension should be increased or reduced merely in accordance with the result of said examinations.

The aforesaid act of June 21, 1879, extends and widens the scope of the law exactly in the line of the act of July 25, 1882, that we have above discussed. It abolishes the stated biennial examinations, and gives the Commissioner power to order an examination at his discretion; and the rate of pension is not to be reduced nor increased in accordance merely with the recommendations contained in the surgeon's certificate of examination, as formerly, but to be fixed by the Commissioner "according to right and justice," after due notice to the pensioner, and upon a "hearing upon sworn testimony." It is thus clear not only that the statute authorizes an investigation into the merits of an adjudicated claim for the purpose of obtaining testimony for the information of the Commissioner, but that the Commissioner himself is required to weigh said testimony in determining whether the rate of pension should be either reduced or increased.

Are the statutes in conflict with the decisions of the Department on the doctrine of *res adjudicata*, and particularly with the decision in the case of Colnor, Edward A. (II P. D., p. 21), as claimed and urged by the attorney for pensioner? The Department is clearly of the opinion that they are not. An examination of the case of Colnor, *supra*, relied on particularly by the pensioner as sustaining his position, will be sufficient to make it evident that said departmental decisions are entirely consistent with the above-named statutes, since all of said departmental decisions are identical with that case in principle.

In said case, the question presented related to origin in the service and line of duty of the disability alleged as the basis of pension. The claimant had presented his proof, his claim had been rejected, and said rejection affirmed on appeal to the Department. He subsequently filed two affidavits on the same points that were passed upon in the former adjudication, and, upon the refusal of the Pension Bureau to re-open the case, the claimant again appealed from the former action of rejection.

The Department refused to entertain the appeal, and held that—

So far as the questions treated of in said opinion and passed upon by the Department are concerned, they became and are *res adjudicata*, and can not now be disturbed or opened.

This is the full extent to which the Department has gone in the application of this rule. Here there was no question raised as to the future payments of pension, nor to determine the present status of one receiving pension, but simply the right of the claimant to receive pension at all; and the rule of *res adjudicata* was applied to just those matters, and those only, to which it has been hereinbefore indicated it would be held to apply in this case.

But even if said decision was in conflict with the above-quoted statutory provisions, said provisions unquestionably settle the question, in the opinion of the Department, that the rule of *res adjudicata* can not be applied to any question as to the future status of and payments to a pensioner, nor to restrict or limit the statutory powers and jurisdiction of the Commissioner to examine, at his discretion, into the merits of any pension case, and to re-adjust the rate of pension to be received in future by the pensioner in accordance with the results of said investigation, as may be deemed by him commensurate with justice and right.

The method pursued by the Commissioner of Pensions in this case was only that pointed out in the statutes already quoted. He proceeded to investigate the present status and condition of the pensioner under his statutory jurisdiction so to do; he had him medically examined again in the exercise of his discretionary powers, granted him expressly by the statute to ascertain his present physical condition from a medical stand-point; he served a notice upon the pensioner that he proposed to reduce his rate of pension, granted him a hearing thereon, and, in the exercise of his judgment, was proceeding to re-adjust the rate of pension that he was in future to receive for his present degree of disability, as it appeared in the light of the sworn testimony produced by said investigation, just as the statute provides he should do. He did not undertake to overrule, to disturb, nor to re-adjudicate any matter passed upon in the former departmental decision, but exercised the discretionary power conferred upon him by law to investigate the present condition of the pensioner and to fix his rate of pension in accordance with what would be just, by reason of the evidence produced by such investigation; and the doctrine of *res adjudicata* invoked by pensioner has no application.

But it is urged by the attorney of pensioner that such discretionary power can be exercised by the Commissioner in those cases only where there has been some change in the severity of the pensionable disability, authorizing an increase or reduction of pension; but that in this case, it is not claimed that there has been any such change in pensioner's disability.

In the opinion of the Department the evidence taken upon the recent investigation does show a decided change for the better in the physical condition of the pensioner. Prior to, and including his medical examination *of April 25, 1883,* his disability was uniformly rated at $24.

Upon the medical examination, had during the recent investigation of his case, January 7, 1888, he was rated, after a very thorough and exhaustive examination by the board of surgeons of this city, at 16–18; and one of the members of the board states, upon the margin of the certificate, that he signs it "upon the understanding that I consider this amount an extremely liberal rating." The testimony taken during said investigation certainly shows an absence of pain, a capacity for labor and self-help not indicated by the evidence on file prior to the date of said former departmental decision, and also an entire absence of nervous convulsions since the date from which he appears to have suffered occasionally prior thereto.

It would be but fair to presume, as a matter of justice to the former administration, which rendered the aforesaid departmental decision, that the evidence before it when the decision was rendered did not disclose the same state of facts, as to the physical condition of the pensioner, as is shown by the evidence recently produced, and to assume in view of the conclusion then arrived at that the pensioner's disability is not the same to-day as it was then.

The Department, however, is clearly of the opinion that these are matters which the statute leaves to your judgment to be decided in the exercise of your discretion upon consideration of the evidence produced by your investigations, and as may seem to you to be in accordance with right and justice. The papers in this case are therefore returned to you with the opinion that you have a clear and unquestionable right, within the jurisdiction given you expressly by law, to adjust the rate of pension to be received by pensioner in accordance with his disability as shown to exist at the present time, and that said former departmental decision does not operate as *res adjudicata* to prevent such action.

You are accordingly directed to proceed with the adjustment of said rate of pension in accordance with the law, and the views of the Department as above set forth.

PURSERS' CLERKS NAVAL OFFICERS.

RICHARD H. SINTON.

1. A Purser's clerk is an officer of the Navy, in the contemplation of the provisions of the act of January 29, 1887. While he was not an officer in the constitutional sense as defined by the Supreme Court in the case of the United States *vs.* Germaine (99 U. S., 508), unless he was appointed by the Secretary of the Navy as the head of a Department, yet, it was the evident intention of Congress to use the word "officer" in a less strict sense in laws granting three months' extra pay and bounty land warrants to officers and enlisted men in the Army and Navy in the Mexican war; and the word "officer" in the act under consideration should be held to apply to those whose rank was recognized in the service by the rules, regulations, and customs in vogue at the time the service was done.
2. The decision in the case of Berkely Ward, late a captain's clerk on board the United States ship, *Mississippi* (No. 10592), rendered by the Department July 2, 1888, is overruled.

Assistant Secretary Hawkins to the Commissioner of Pensions, December 1, 1888.

I have considered the case of Richard H. Sinton, late purser's clerk United States ship, *Ohio* (Mexican War Claim No. 16550), of August 24, 1888, on appeal from your office decision of December 27, 1887, rejecting his claim for pension as a survivor of the Mexican war, on the ground that, during the period in question, the appellant was not shown to have served in either the U. S. Army or the Navy, as either an officer or an enlisted man.

You state in your report to the Department, under date of September 21, 1888, that—

It is shown by the records that the appellant served on the United States ship *Ohio* from August 25, 1847, to December 3, 1848, as purser's clerk. The appellant, to be entitled to rights accruing under the provisions of the act of Congress approved January 29, 1887, must be shown to have served during the war with Mexico in the Army or in the Navy of the United States, as an officer or as an enlisted man. The fact having been established by the proof on file that, during said war, the appellant did not serve in any capacity other than that of a civilian employé, under the law he has no title to pension. The question at issue in this case being similar in character to that involved in the claim of Berkely Ward, late captain's clerk, United States ship *Mississippi*, No. 10592, it comes within the scope of the departmental decision therein, of July 2, 1888, affirming the action of this office. The appeal is therefore without merit and should be dismissed.

The following are claimant's assignments of error:

(1) That said decisions are contrary to the law and decisions of the court.

(2) They are erroneous in declaring that claimant was a "civilian" employé of the service.

(3) They are erroneous in holding that claimant was not an officer of the Navy.

(4) They are erroneous in holding that officers must have enlisted.

The only question involved in this appeal is, was claimant an officer or an enlisted man within the meaning of the provisions of the act of January 29, 1887, granting pensions to soldiers and sailors of the Mexican war? Beneficiaries named in said act, so far as applicable to this case, are "the surviving officers and enlisted men, including marines, militia, and volunteers of the military and naval service of the United States in Mexico, or on the coasts or frontier thereof, or en route thereto in the war with that nation; * * * that every such officer, enlisted man * * * who is or may become sixty-two years of age * * * shall be entitled to the benefits of this act."

In 1794, Congress, in an act entitled, "An act to provide for naval armament," authorized the purchase and equipment of "four ships of 44 guns each, and two ships of 36 guns each." In section 2, the act provides for the appointment of commissioned officers for each of said ships, who are to be appointed and commissioned in like manner as other officers of the United States. Section 3 of the act, after providing for the appointment by the President of 1 sailing master, 1 purser, 1 boatswain, 1 gunner, 1 sail-maker, and 8 midshipmen, also provides for the "following petty officers who shall be appointed by the captains

of the ships, respectively," and enumerates, among such petty officers, 1 "captain's clerk." Section 4 provides for crews consisting of 150 seamen, 103 midshipmen and ordinary seamen, 1 sergeant, 1 corporal, 1 drum, 1 fife, and 50 marines for the larger ships, and a correspondingly smaller number for the two 36 gun ships. These are to be "over and above officers hereinbefore mentioned." Section 6 provides for the pay and subsistence of commissioned and warrant officers. Section 7 provides for the pay and allowance for "petty officers, midshipmen, seamen, ordinary seamen, and marines," and that "each of said persons shall be entitled to one ration per day." (1st Statutes at Large, pages 350, 351.)

July 1, 1797, Congress, in an act entitled "An act to provide a naval armament," empowered the President to cause the frigates *United States*, *Constitution*, and *Constellation* to be manned and employed. This act contains the same provision in relation to "petty officers," under which title is enumerated "one captain's clerk," with a similar provision in relation to pay and rations to that contained in the act of March 27, 1849. (1st Statutes at Large, pp. 523–525.)

On the 2d of March, 1799, Congress, in an act entitled an "Act for the Government of the Navy of the United States," provided in section 11, as follows: "All the officers not having commissions or warrants (or appointed, commissioned, or warranted officers for the time being) are termed *petty or inferior officers.*" Sub-section 6, of section 50, provides the same amount for captain's clerk. (1st Statutes at Large, p. 709.)

Article 33, of the act of April 23, 1800, provides that "all officers, not holding commissions or warrants, or who are not entitled to them, except such as are temporarily appointed to the duties of a commissioned or warranted officer, are deemed petty officers." (2 Statutes at Large, p. 49.)

The same provision is made for the distribution of prize money to captain's clerk in said act as is provided in the act of March 2, 1799. Section 8, of paragraph 7, of article 42, provides that "every officer, seaman, or marine disabled in the line of his duty, will be entitled to a pension, not exceeding one-half his monthly pay."

An act to increase the Navy of the United States, approved January 2, 1813, provides for the appointment of petty officers by the captain, and enumerates, among others, "one clerk." (2 Statutes at Large, p. 789.)

At act approved March 3, 1835, provides that "from and after the passage of this act, the annual pay of the officers * * * ." Under the head of "officers" are enumerated clerks, as follows:

> Clerks of a yard, $900; first clerk to the commandant of a Navy, $500; second clerk to the commandant of a Navy, $750; to commanders of squadrons, captains of fleets, and commanders of vessels, $500. (4 Statutes at Large, p. 756.)

The act of March 30, 1812, provided in section 6 for the appointment of "pursers" by the President, whose appointments were required to be

onfirmed by the Senate; and the pursers were required to give bonds n the sum of $2,000 each. (2 Statutes at Large, 699.)

The act of March 1, 1817, increased the purser's bonds to $2,500. (3 tat., 350.)

The act of August 26, 1842, fixing the pay of pursers and other offiers in the Navy, provided in section 8 that pursers attached to and on uty at the navy-yard, Boston, New York, and Norfolk, and on seaoing vessels of a larger class than sloops of war, shall be authorized to ppoint a clerk or assistant, to be approved by the commanding officer, hose yearly pay in a frigate or navy-yard was fixed at $500, and in hips of the line at $700. It further provided as follows:

Said assistant or clerk shall have the privileges which are allowed the clerk of the ommanding officer, and each purser and clerk while attached to vessels in commission shall receive one ration per day. (5 Statutes at Large, p. 535.)

The foregoing were the statutes in force during the war with Mexico.

The act of March 3, 1853, making appropriations for naval service, rovides for the pay of the purser and his "clerks" at naval stations n California, and makes further provision for pay to all petty officers, eamen, etc., during the war with Mexico, who served on the Pacific oast. (10 Statutes at Large, p. 220.)

The act of August 15, 1866, provided that pursers on sloops and naller vessels shall be authorized to appoint clerks, to be approved by ne commanding officer, and such clerks shall be allowed the privileges f the commanding officers. Their pay shall be $400 per annum and ne ration per day each. (11 Stat., p. 45.)

In 1860 the title of the purser was changed to that of paymaster. Act of June 2, 1860; 12 Stat., p. 80.)

It will be observed that the acts of 1794, 1797, 1799, 1800, 1813, and 835, all designated captains' clerks as petty officers of the Navy, and rovided that they should be entitled to prize money, and, in case of isability incurred in line of duty, to pensions of half pay during life.

The act of August 26, 1842, places pursers' clerks in the same grade, ank, rights, etc., as captains' clerks, and designates a purser's clerk as ssistant or clerk.

Section 1410 of the Revised Statutes, on the organization of the Navy, rovides that—

All officers not holding commissions or warrants, and who are not entitled to them, xcept such as are temporarily appointed to the duties of a warrant officer, and except secretaries and clerks, shall be deemed petty officers, and shall be entitled to bedience in the execution of their offices from persons of inferior ratings. (See, also, he act of July 17, 1862, 12 Statutes, 610).

The designation of rank of pursers' clerks appears to be changed in he foregoing section from *petty* officers to *officers*.

Section 4695 of the Revised Statutes, classifying the rates of pensions o officers of the Navy, places "clerks" of admirals and paymasters, nd of other officers commanding vessels, on the same grade and rank

as midshipmen, second and third assistant engineers, and all warrant officers in the naval service.

It would thus appear that every act that has been passed by Congress on the subject declares that pursers' "clerks" and captains' "clerks" are officers of the Navy. Such also appears to have been their rank as recognized by the Navy Department General Orders, by the decisions of the Court of Claims, and by the United States circuit and supreme courts. The Navy Department, by General Orders No. 153, under date of April 18, 1870, declares in terms that clerks to paymasters are officers of the Navy. Again, on April 3, 1875, General Orders No. 193 declares the same in regard to "all officers, including secretaries and clerks serving on board ships in commission," etc. (The U. S. circuit court for the ninth circuit, *in re* Robert T. Bogart passed upon the question, holding that a paymaster's *clerk* was an "*officer.*") This was a habeas corpus case brought by Bogart, and one of the material allegations of the petitioner was that he was not a person in the naval forces of the United States while acting as paymaster's clerk in the Navy, but that he occupied the position of a civilian. In passing upon this branch of this case Sawyer, circuit judge, said:

Was the petitioner, while the clerk of a paymaster in the Navy, on duty in the manner before stated, a person in the naval forces of the United States within the meaning of this act (referring to the act of March 2, 1863, 12 Stat., 696)? It is contended on his behalf that he was not, but on this point we entertain no doubt. He was not merely an employé or servant of the paymaster, but, on the contrary, as we have seen from the regulations of the Navy set out in the statement of facts, he was an officer in the Navy. He received his position by appointment; such appointment was required to be approved by the commander of the ship. He was required to give a written acceptance, in which he bound himself to be subject to the laws, regulations, and discipline of the Navy, which acceptance is required to be filed in the Department. He was required to qualify by taking an oath, and to expressly engage to serve till regularly discharged; and this could only be done by the appointing power, approved in the same manner as his appointment had been approved. He was an officer of the same class as the paymaster himself, the surgeons, engineers, etc., viz, a staff officer; and he ranked with midshipmen, who are line officers. (2 Sawyer 407.)

In the case of *ex parte* Reed, decided by the Supreme Court, October, 1879, Reed was the petitioner for a writ of habeas corpus. The seventh allegation in his petition was that "in his capacity as paymaster's clerk, as aforesaid, he was not amenable to trial by court-martial nor subject to the jurisdiction of said court" (referring to a naval court-martial, before which he was tried, on board the United States ship *Essex*, in July, 1878). It was urged by his counsel that paymasters' clerks were recognized only indirectly in the chapter on the organization of the Navy (referring to sections 1386, 1387, 1388, and 1556 of the Revised Statutes); that they were not officers holding either commissions or warrants, nor were they deemed petty officers (citing section 1410).

Mr. Justice Swayne in delivering the opinion of the court, after reciting the manner in which paymaster' "clerks" were appointed, said:

The place of paymaster's clerks is an important one in the machinery of the Navy. *Their appointment* must be approved by the commander of the ship. Their accept-

ance and agreement to submit to the laws and regulations for the government and discipline of the Navy must be in writing and filed in the Department. They must take an oath, and bind themselves to serve until discharged. The discharge must be by the appointing power, and approved in the same manner as the appointment. They are required to wear the uniform of the service; they have a fixed rank; they are upon the pay-roll, and are paid accordingly. They may also become entitled to a pension and to bounty land (Navy Regulations of August 7, 1876, p. 95; *in re* Bogart, 2 Sawyer, 396; United States *vs.* Bogart, 3 Benedict, 257; Rev. Stat., secs. 2426 and 4695). The good order and efficiency of the service depend largely upon the faithful performance of their duties. If these officers are not in the naval service, it may well be asked who are? (100 U. S. R., p. 13–23.)

The question as to whether a paymaster's clerk was an officer of the Navy within the act of June 30, 1876 (19 Stat., 65, chapter 159) so as to be entitled to the benefit of mileage allowed by that act, was before the Supreme Court for decision in January, 1888. Mr. Justice Miller, in delivering the opinion of the court, cited the case of United States *vs.* Germaine (99 U. S., p. 508) as to what was necessary to constitute a person an officer of the United States in the various branches, stating the rule there announced as follows:

In that case it was distinctly pointed out that under the Constitution of the United States all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or by the head of a Department; and the heads of the Departments were defined in that opinion to be what are now called the members of the Cabinet. Unless a person in the service of the Government therefore holds his place by virtue of an appointment by the President, or of one of the courts of justice, or of heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.

Following this definition, the court held:

From all this it is clear that neither by the regulations, nor by the statutes, nor by any constitutional provision is the present claimant an officer of the Navy. Undoubtedly Congress may have used the word "officer" in some other connections in a more popular sense, as will be shown in the case of United States *vs.* Hendee, immediately following this, in which case it will be the duty of the court in construing such an act of Congress to ascertain its true meaning and be governed accordingly. (U. S. *vs.* Monat, 124 U. S., p. 303.)

In the case of the United States *vs.* Hendee, above referred to, the Supreme Court held that a paymaster's clerk in the Navy is an officer of the Navy within the meaning of the provisions of the act of March 3, 1883 (22 Stats., 473), respecting the longevity pay of officers and enlisted men in the Army or the Navy. This case was an appeal from the Court of Claims. The following was the third "finding of facts":

The practice of the Navy Department has not been uniform as to the classification of paymasters' clerks and their designation as officers or otherwise, but in several regulations, orders, and official documents they have been designated as officers.

The Court of Claims then cited copies of official orders of the Navy Department. Mr. Justice Miller, in delivering the opinion of the United States Supreme Court, said:

The statute of March 3, 1883, provides as follows: "And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the bene-

fits of such actual service in all respects, in the same manner as if all said service had been continuous and in the regular Navy in the lowest grade, having graduated pay held by such officer since last entering the service." (22 Stat., 473, chap. 97.)

The court then proceeded as follows:

In the opinion of the Chief-Justice, rendered in the Court of Claims, the single issue raised is the question of law whether or not a paymaster's clerk is an officer of the Navy within the meaning of said act.

We have just decided, in the case of United States *vs.* Mouat, *ante*, 303, that a paymaster's clerk is not, in the constitutional sense of the word, an officer of the United States; but we added also that Congress may have used the words "an officer" in a less strict sense in some other connections, and in the passage of certain statutes might have intended a more popular signification to be given to that term. And in regard to the act of 1883, we think that its proper construction requires that the officer, when subsequently coming to compute what increase shall be made to his statutory salary by reason of his previous service, has a right to count other service than that rendered in the character of an officer, as defined by the Constitution of the United States. Its language is that "all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men." The claimant here is an officer of the Navy, and is therefore to be credited with the actual time that he served as an officer or enlisted man in the regular or volunteer Army, or Navy, or both. We think the words "officers or enlisted men in the regular or volunteer Army, or Navy, or both," were intended to include all men regularly in service in the Army or Navy, and that the expression "officers or enlisted men" is not to be construed distributively as requiring that a person should be an enlisted man, or an officer nominated and appointed by the President or by the head of a Department, but that it was meant to include all men in service, either by enlistment or regular appointment in the Army or Navy. We are of opinion that the word 'officer" is used in that statute in the more general sense, which would include paymaster's clerk; that this was the intention of Congress in its enactment, and that the collocation of the words means this, especially when it is added that the "shall receive all the benefits of such actual service in all respects and in the same manner as if said service had been continuous and in the regular Navy."

After citing the case of Bogart (2 Sawyer, 396), heretofore referred to, Justice Miller closes as follows:

In the opinion of Chief-Justice Richardson, delivered in the Court of Claims in the case now under review, the same view was ably argued; and while we do not concede that a paymaster's clerk is, for all purposes and in the general sense of that term, an officer of the Navy, we believe that, within the meaning of the statute now under consideration, providing for increase of pay to officers of the Navy according to length of service, it was the purpose of the framers of that act to include service rendered as a paymaster's *clerk* in the Navy.

Considering the act of January 29, 1887, in the light of the foregoing statutes and decisions, I am of the opinion that the decision of the Supreme Court, in the case last above cited, is conclusive on this question. The language of the Mexican-war act is "surviving officers and enlisted men, including marines, militia, and volunteers of the military and naval service of the United States." Claimant appears to have been duly appointed purser's clerk of the U. S. ship *Ohio*, August 25, 1847; to have taken the oath required; subscribed to and subjected himself to the laws, rules, and regulations of the Navy, and served until regularly discharged at San Francisco, Cal., December 23, 1848. He alleges in a communication on file that the same ground was taken in opposition

to his application for his three months' extra pay, viz, that he was not an *officer* or *enlisted man*, but that said decision was reversed and his money paid; that he was as much an officer of the Navy (being appointed by the Secretary of the Navy, Hon. John Y. Mason, in writing) as any warrant officer; was regularly entered on the rolls of the *Ohio* and borne on the books of that ship; had his station in quarters; was subject to all the Articles of War, as completely as any other officer or man in the service; in addition to which he was detailed for military duty as a topographer, under command of the late Lieut. Isaac G. Strain, on two extended expeditions, and has received his bounty land-warrant under the act of March 3, 1855.

In referring to the U. S. Navy Regulations of 1865, subdivision 5, article 2, page 2, it appears that paymaster's clerks are assigned the rank and are regarded as staff officers. Paragraph 22 ranks clerks with midshipmen.

Paragraph 249, page 44, provides:

No secretary or clerk shall be entered upon the muster-roll of any vessel, nor entitled to any pay, until he shall have accepted his appointment by letter in duplicate, binding himself therein to be subject to the laws and regulations in the government of the Navy and the discipline of vessels, so long as his appointment may continue. One of these letters in duplicate shall be transmitted immediately to the Department by the officer conferring the appointment, together with the oath of allegiance; the other copy of the letter of acceptance shall be preserved by that officer. * * * The acceptance of an appointment as secretary or clerk shall be understood as binding such person to serve with the officer who appointed him until regularly discharged.

Paragraph 681, page 119, provides that—

A clerk to a commanding officer, or a clerk to a paymaster, is to be regarded as a steerage officer, and as entitled to mess and be otherwise accommodated therein.

Paragraph 1141, article 30, page 204, provides:

To entitle an officer of the Navy, including a secretary or clerk, to traveling expenses, he must furnish the pay agent, or paymaster of his vessel, with a certified copy of his orders and indorsements thereon, after having reported for duty.

This section also provides mileage for enlisted men under certain conditions.

Section 1161, page 208, provides:

Upon an original appointment of an officer, his pay will commence from the date of acceptance. This rule applies to secretaries and clerks.

I see no reason for holding that a purser's clerk is not an officer within the contemplation of the provisions of the act of January 29, 1887. While he is not an officer in the Constitutional sense, as defined by the Supreme Court in the case of the United States *vs.* Germaine (99 U. S., 508), unless he was duly appointed by the Secretary of the Navy as the head of a Department, yet it was the evident intention of Congress to use the word "officer" in a less strict sense in laws granting three months' extra pay and bounty land-warrants to officers and enlisted men in the Army and Navy in the Mexican war; and the

word "officer" in the act under consideration should be held to apply to those whose rank was recognized in the service by the rules, regulations, and customs in vogue at the time the service was rendered.

As was said by the Supreme Court in the case of United States *v.* Hendee, heretofore cited, the words "officers or enlisted men in the regular or volunteer Army or Navy or both," were intended to include all men regularly in the service in the Army or Navy; and the expression "officers or enlisted men" is not to be construed distributively, as requiring that a person should be an enlisted man or an officer nominated and appointed by the President or by the head of a Department, but that it was meant to include all men in the service either by enlistment or by regular appointment in the Army or the Navy. We are of the opinion that the word "officer" is used in the statute in the more general sense, which would include a paymaster's clerk, and that it was the intention of Congress in its enactment that the collocation of words should mean this.

The language above used is applicable to the claimant in this case, and the Department is of opinion that he was an officer of the Navy, regularly appointed as such.

In accordance with this conclusion, your action is reversed, and you will proceed to adjudicate this case in accordance with the views herein expressed.

The case of Berkely Ward, late a captain's clerk on board U. S. S. *Mississippi*, No. 10592, decided by the Department July 2, 1888, is hereby overruled, and you will also proceed to adjudicate that case in accordance with the rule herein announced.

The papers in the case accompanying your letter of transmittal of September 21, 1888, are herewith returned.

LEGAL TERMINATION RESTORATION.

PATRICK WELCH, ALIAS PATRICK CONNALLY.

1. The words "legally terminated," as used in section 4719, Revised Statutes, having reference to a grant of pension, do not mean that the pensioner is not entitled to a pension, but the termination of the right to receive the same by reason of non-claim, and therefore the termination of the right to have his name on the list of pensioners. The context of the statute assumes that a pension was granted, that the pensioner had a right to draw it, but, as he has not drawn it for a period of three years, it presumes that it is "legally terminated" by reason of certain assumed facts transpiring since the pension was granted.
2. Where a continuing right of this nature is taken away by statutory provision, designed to guard the Treasury against a future demand in the name of a person who is assumed to be dead, or to be remarried, or to have recovered from the disability, and the same statute provides for a restoration, the application therefor must be determined by compliance with the conditions on which the statute itself allows the restoration.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 10, 1889.

Herewith are returned the papers which accompanied your report, dated November 16, 1888, on the appeal of Patrick Welch, alias Patrick Connally, private marine, U. S. Navy.

The records of the War Department show that claimant was enrolled June 15, 1861, in Company A, Twenty-third Illinois Volunteers, and was mustered out October 8, 1861, by reason of being captured and paroled September 20, 1861. It appears from the records of the Navy Department that, on August 2, 1858, he had enlisted as landsman; final disposition not reported. On February 1, 1862, he was enlisted by Captain Garland under the name of Patrick Connally; was transferred to U. S. S. *Fort Henry*, April 2, 1862; transferred to U. S. S. *Union*, October 6, 1863; transferred to Brooklyn (N. Y.) Hospital October 17, 1863; and was discharged February 1, 1864, under surgeon's certificate by reason of *hemeralopia*, Surgeon A. L. Gihom stating that "the disease first appeared in 1863, while serving on board U. S. S. *Roanoke* in James River, since which time he has had several returns of it. Is subject to frequent attacks of *febris intermittens*. Has taken large doses of quinine. There is no evidence that his complaint originated in the line of duty."

The Bureau of Medicine and Surgery of the Navy Department reports as follows:

Fort Henry; admitted November 4, 1862; *laryngitis;* origin not stated. Discharged November 6, 1862. Admitted May 4, 1863; *Tumor*, "glandular enlargement under left ear;" origin not stated. Discharged June 10, 1863. Admitted September 13, 1863; *chills and fever*. Origin of disease not stated. Discharged October 6, 1863, to Naval Hospital, Brooklyn, N. Y. Admitted October 16, 1863; *Remittent fever*. Hospital ticket states: "His disease originated strictly within the line of duty." Case paper states: "Patient complains of headache, dull paid in left side, constant pain in lumbar region." Discharged February 1, 1864, by medical survey.

Claimant filed his original declaration February 4, 1864, alleging as a basis of his claim that on United States steamer *Fort Henry* he was disabled by *albuminuria*, the sequel of remittent fever.

Pension was allowed February 8, 1864, at $4 per month from January 28, 1864, for *albuminuria*, result of intermittent fever; but, according to a communication from the Fourth Auditor of the Treasury Department, dated April 30, 1887, nothing was paid to claimant under said certificate, as shown by the record. He filed an application for restoration August 18, 1886, which was rejected July 14, 1887, upon the ground of claimant's sworn statement that he is unable to furnish medical evidence as to the continuance of the alleged disability as required by law, and the board who examined him September 29, 1886, failed to rate.

From this action claimant appealed October 19, 1888, contending that the disability must have existed when the pension was granted, that testimony has been filed to show that it has existed since 1876, and that prior to this date continuance can not be shown.

OPINION.

It appears that a pension was granted to this man February 8, 1864, at $4 per month from January 28, 1864, but that nothing was paid under the certificate. March 4, 1867, he was dropped from the rolls, because he had not for three years claimed anything under the certificate. It appears further that the certificate never was in his possession, and that it was surrendered by Dr. William Whelan, to whom it had been sent on the 8th of February, 1864. He did not know of the issue of the certificate until the year 1886. The fact that the certificate never reached him, or that he did not know of it, is not material, because section 4719, Revised Statutes, makes the failure of a pensioner to claim his pension for three years after the same has become due presumptive evidence that the pension has terminated by reason of the pensioner's death, remarriage, recovery from the disability, or otherwise, and requires that his name be stricken from the list of pensioners, subject to the right of restoration on a certain showing by a new application.

Two questions arise:

(1) Whether under section 4719, Revised Statutes, when a pensioner has been stricken from the list of pensioners for the reason of non claim for three years after the pension became due, it is necessary for him, in an application to be restored to the list, to make proof that he was originally entitled to the pension.

(2) When the pension has been legally terminated by the presumption of the statute of one of the facts enumerated therein, what must the pensioner show on his application to be restored?

By the terms that the pension has "legally terminated," the statute does not mean that the pensioner was not entitled to a pension. The statute adopts a presumption that the pensioner has died, or has remarried, or has recovered from his disability, or otherwise, as a reason for striking his name from the list of pensioners, after a non-claim of the pension for three years from the time it became due. The statute therefore assumes that the pension was rightfully granted, and might have been drawn, and the "legal termination" imports *ex vi termini*, not a retroactive effect, invalidating the pension, but a termination of the right to receive it by reason of the non-claim, and a termination of the right to have the name remain on the list of pensioners. It is not necessary, on an application to have the name restored to the list, for the applicant to show that he was originally entitled to the pension. The maxim *omnia præsumuntur rite et solenniter esse acta* is to be applied to the grant of the pension, unless there is some provision of law which requires that, in an application to have the name restored, the pensioner must make proof of his right to the pension as if he were making an original application for the grant of it. This the statute does not require. Its context assumes that a pension was granted, that the pensioner had a right to draw it, but, as he has not drawn it for a period of three years, it adopts a presumption, not that he was not *ex-*

titled to it, but that it is now "legally terminated," that is, that the right to draw it is taken away by reason of certain assumed facts which have transpired since the pension was granted. When a continuing right of this nature is taken away by statutory provision designed to guard the Treasury against a future demand in the name of a person who is there assumed to be dead, or to be remarried, or to have recovered from the disability, and the same statute provides for a restoration, the application for the restoration must be determined by compliance with the conditions on which the restoration is to be allowed.

The "new application," provided for by section 4719, is not an application for the grant of a pension; it is an application for restoration to the list of pensioners. The statute assumes that a pension has been granted and has "become due," but it adopts a presumption of a legal termination of the right to draw it, as a reason for striking the pensioner's name from the list. The phrase "legally terminated" should not receive a construction that will carry it backward to the original grant of the pension. The statute provides for a removal of the presumption that the pension has legally terminated, by a process of restoration on certain conditions. It gives a "right of restoration to the same," that is to say, to the list of pensioners. It does not undertake to give, and does not give, a right to make an application for the grant of a pension. The grant of the pension is a past transaction on the records of the Pension Office, and the "new application" is an application for a restoration of the right to receive the pension, which has been interrupted and suspended until the pensioner makes certain proofs. What, then, are these proofs?

(1) He is to account satisfactorily for his failure to claim the pension.

(2) If he was an invalid of the class who were not exempt from biennial examinations, he is to produce medical evidence as to the continuance of his disability.

It appears from the evidence that appellant has offered no satisfactory explanation of his failure to claim the pension granted him.

It further appears that he was an invalid of the class who were not exempt from biennial examinations.

Claimant's physical condition, January 27, 1864, is shown by a medical survey made on that day, which reports that "his disability, albuminuria, sequel to remittent fever, will be, probably, permanent in duration, and disables him one-half. * * * His disease originated strictly within the line of duty."

He was examined by the San Francisco (California) board, September 19, 1886, who found "general appearance good, lungs sound, liver and spleen slightly enlarged. No tenderness, no evidence of pain in right side. Endocardial murmurs over space second costal cartilage, of a harsh blowing character, denoting hypertrophy of the aorta at its origin. The aneurismal sound may be heard the entire aorta at its arch. Tests

urine show secretion perfectly normal. Rated at one-half for heart disease."

The medical testimony filed in December, 1887, and in March, 1888, shows that he was then suffering with slow and painful digestion, chronic, from waterbrush and vomiting.

Continuance of the alleged disability each year since discharge, and the extent to which disabled for the performance of manual labor, has not been shown. Your rejection is therefore affirmed.

INSANITY—PRIMARY CAUSE OF DEATH.

ANN, WIDOW OF PHILIP DANIEL GALLAGHER.

Where insanity is alleged as the primary cause of soldier's death from suicide, there must appear a medical record, or other direct and satisfactory testimony, connecting the origin of the alleged disability with the military service. The necessity for such evidence is strengthened by the fact that the soldier did military duty subsequent to the alleged origin of his disability, but without a hospital record of the same.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 10, 1889.

Herewith are returned the papers which accompanied your report of December 8, 1888, upon the appeal of Ann Gallagher, widow of Philip Daniel Gallagher, deceased, late private, Company D, Seventy-sixth Pennsylvania Volunteers, from your action rejecting her claim for pension.

The records of the War Department show that the soldier served in the Seventy-sixth Pennsylvania Volunteers from his enrollment as a "substitute," October 14, 1864, to July 18, 1865, when he was mustered out of the service, but do not indicate that, during this period, he was in any way either mentally or physically disabled.

It is shown by the evidence on file that the soldier died September 22, 1870, from arsenical poisoning, and that the fatal drug was taken by him with suicidal intent; and it further appears that he was never an applicant for pension.

The claimant filed her declaration for pension as the widow of the soldier December 19, 1879, alleging as the basis of her claim that the soldier died on the date above mentioned from the effects of poison administered by himself while suffering from dementia caused by disease contracted during his military service.

The claim was specially investigated, and, after due consideration of the testimony, was rejected September 13, 1888, upon the ground that the proof adduced failed to establish it.

From said action of rejection the claimant appealed November 30, 1888, contending that the hospital record of soldier shows that he was

treated in service for insanity which resulted in his suicide; that the evidence filed in support of her claim fully establishes the origin of soldier's insanity in the service and line of duty; that his death by suicide was the result of said insanity, and that her claim for pension should be allowed.

OPINION.

The difficulty that presents itself upon consideration of the evidence in this claim is the entire failure of proof connecting the insanity or suicidal mania of the soldier with his Army service. This is a missing link in the chain of evidence which is absolutely essential to make out a proper case for the allowance of pension, and, unless supplied, it is necessarily fatal to the claim.

It seems to be reasonably certain, from the testimony on file, that the soldier's death resulted from poisoning by arsenic administered by himself with suicidal intent while the victim of dementia or mania, and when, therefore, he was irresponsible for his actions; and, also, that he had suffered more or less, at intervals, from attacks of said dementia or mania for some years subsequent to his discharge from the service and prior to his death.

So far from the hospital record of the soldier, during service, showing the existence of and treatment for dementia or mania, as contended by the appellant, the only hospital record that the soldier had merely shows his admission to the hospital at Camp Cadwallader, near Philadelphia, Pa., and that he remained there a short time. It gives no diagnosis of his disease, and does not indicate in any manner the cause of his admission, nor the nature of his treatment while an inmate of said hospital, wholly failing to throw any light upon the soldier's mental condition at that time. There is no medical nor other testimony showing any cause, originating in the service, to produce the insanity which is relied on as the basis of this claim.

The only testimony tending to connect said alleged insanity with the service consists of the statements of Mary Early, a relative, who says she visited the soldier while he was sick at said hospital, and that she found him in a demented condition. She does not, however, pretend to state the nature of his disease, nor to assign any cause for the condition in which she says she found the soldier, nor can she state the duration of his alleged dementia, and she fails to connect it in any way with the soldier's Army service. In view of the subsequent service of the soldier, without record of said disability, it is manifest that testimony of the above nature is wholly insufficient to establish the fact of origin, and that this necessary fact has not been proved. Your action rejecting this claim is accordingly affirmed.

SECONDARY CAUSES.

MARY E., WIDOW OF GEORGE W. LEWIS.

The Department holds that, when a person, disabled by injury received or disease contracted in the line of military duty, voluntarily places himself in a position particularly subject to risk and where such injury or disease increases the liability to accident, he must be regarded as assuming in a great measure the risk, so that accidents happening to him under such circumstances have such a remote and uncertain connection with the service, as a consequence, that neither disability nor death, resulting from them, comes within the pension law.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 5, 1889.

Herewith are returned the papers which accompanied your report of the 28th of November, 1888, upon the appeal of Charles and William B. King, of this city, from the action of your office rejecting the claim of Mary E. Lewis, widow of George W. Lewis, for pension No. 321894.

The said George W. Lewis was enlisted on the 5th of November, 1863, and was a private in Company C, First Regiment of New Jersey Cavalry Volunteers, until the 23d of December, 1864, when he was discharged on account of disability. Albert Longwell, surgeon, states, in the certificate of disability, that he had carefully examined said George W. Lewis, and found him incapable of performing the duties of a soldier because of epilepsy, adding: "Paroxysms are at long intervals. Those that have come under my observation were quite violent. Disease existed previous to enlistment. He is not fit for the Veteran Reserve Corps."

The said George W. Lewis never applied for a pension. He was drowned on the 7th of September, 1884. On the 11th of December, 1884, the widow filed a declaration for pension, in which she alleged that her husband was drowned at Quantico, Va., on the 7th of September, 1884, and that the drowning was "supposed to be the result of epilepsy, contracted in the United States service."

The claim was rejected by the Pension Office on the 13th of March, 1885, on the ground that epilepsy, the disease to which the death of claimant's husband is indirectly attributed, had its origin before he entered the military service.

From this action an appeal was taken.

The case was before the Department on the 3d of November, 1887, when the decision of your office was affirmed. Since that date the applicant has filed a number of affidavits with a view to showing that her husband was free from epilepsy when he entered the service. This testimony merely shows that the witnesses never knew nor heard that applicant's husband had epilepsy before his enlistment in the Army. The testimony was taken more than twenty-four years after the date to which it refers. In connection with the testimony previously filed, it is not of sufficient weight to establish the point intended to be proved, *in face of the* official record to the contrary, made at the date of the

soldier's discharge, which, it must be presumed, was based upon good evidence—most probably upon his own statement.

If, however, it were shown that the soldier was free from epilepsy at the time he entered the army, and that the disease was contracted in the line of duty in the service, yet, the claim of the widow for pension would not be established. It appears that the husband was a fireman on a tug boat on the Potomac River, and that on the 7th of September, 1884, while so employed, he fell overboard and was drowned. No one saw him fall. His falling overboard is attributed to an attack of epilepsy, merely because he was subject to that disease. It appears from the evidence that when Mr. Lewis was last seen he was sitting in a position where a slight movement would have caused him to lose his balance and to fall overboard. There is no proof that he fell overboard because of an attack of epilepsy. If it could be proved that he fell overboard because of an attack of epilepsy contracted in the service, there would still be a question in the case which would have to be decided adversely to the claimant. The husband voluntarily engaged in an occupation subject to risk from falling overboard, and when last seen was, of his own accord, in a position in which any person would have been liable to such accident. When a person, disabled by injury received or disease contracted in the line of duty in the military service, voluntarily places himself in a position particularly subject to risk and where such injury or disease increases the liability to accident, he must be regarded as assuming in a great measure the risk, so that accidents happening to him under such circumstances have such a remote and uncertain connection with the service, as a consequence, that neither disabilty nor death resulting from them comes within the provisions of the pension law.

The decision rejecting this claim is therefore affirmed.

"SERVICE" SUBSTITUTED FOR "DISABILITY" PENSION.

BURTON RANDOLPH.

Claimant having filed his original declaration for pension September 15, 1884, alleging disabilities incurred in the war with Mexico, and "the last paper" filed by his attorney to establish the claim being the report of a medical examination dated September 29, 1888, authorizing a pensionable rating at $4 per month, the Department applies to claimant section 4713, Revised Statutes, which provides, in express terms, that, "In all cases in which cause of disability or of death originated in the service, prior to the 4th day of March, 1861, and an application for pension shall not have been filed within three years from the discharge or the death of the person on whose account the claim is made, * * * the pension shall *commence* from the date of filing by the party prosecuting the claim the last paper requisite to establish the same." In such case no injustice is done claimant if the Commissioner of Pensions grant him a *service* pension under the act of January 29, 1887, instead of a *disability* pension (commencing from September 29, 1888), under the general law, in accordance with the evidence contained in the "last paper" filed by "the party prosecuting the claim," as "requisite to establish the *same.*"

Assistant Secretary Hawkins to the Commissioner of Pensions, December 5, 1888.

Herewith are returned the papers which accompanied your report of November 7, 1888, upon the appeal of Burton Randolph, late private Company D, Third Missouri Mounted Volunteers, Mexican war, certificate No. 53, from your action rejecting his claim for pension.

The claimant filed his declaration for pension September 15, 1884, alleging, as the basis of his claim, that he incurred paralysis of the right arm and side in 1848, while in the service in the Mexican war, and while he was on duty in New Mexico. In a supplemental declaration, subsequently filed, he alleged that said paralysis, which involves the entire right side, affects his hearing.

The records of the War Department show that the claimant, during the war with Mexico, served in the Third Missouri Mounted Volunteers, from his enrollment, May 8, 1847, to October 19, 1848, and that, in either May or June of the last-mentioned year, he was "present, sick;" but they do not give the nature of this sickness, nor indicate that, during said period, he suffered from any specific disability. Having been subjected to a special investigation, the claim was rejected September 29, 1888, upon the ground that the proof adduced failed to establish the fact that the claimant during his military service incurred the disabilities alleged.

It appearing, in the course of the adjudication of said claim, that the appellant was entitled to pension for service in said war under the provisions of the act of Congress approved January 29, 1887, his name was placed, by your direction, upon the pension rolls in pursuance thereof, and a service pension granted him, to date from the passage of said act, although no application had been made therefor.

From said action he appealed to the Department October 26, 1888, contending that he should have been pensioned under the general law for the disability alleged in his declaration, instead of under the act aforesaid, and that the refusal to so pension him involved the loss of pension from September 15, 1884—the date of filing said declaration—to January 29, 1887, the date of said enactment under which he was pensioned.

OPINION.

As appears from the foregoing statement of this claim, the appellant, having applied for a pension for disability alleged to have been incurred in the service and line of duty during the Mexican war, and said claim having been rejected, was, by your direction, granted a service pension under the provisions of the act of January 29, 1887, without having made a specific application therefor.

Appellant, being dissatisfied with this action, appeals to the Department, contending that his invalid claim should have been allowed, and that he should have been pensioned under the general law, upon the claim made by him, and that the effect of the grant of service pension

has been to deprive him of pension from the date of filing his aforesaid declaration.

The claim of appellant was subjected to a thorough and exhaustive special investigation, and all the sources of information which could be of value in the adjudication of it appear to have been exhausted. The testimony so obtained, as well as the evidence filed by appellant, has been duly considered and carefully reviewed by the Department upon this appeal, and is not considered sufficient to connect the alleged disability with the service. There is evidence tending to show that the right arm of appellant was severely injured by a burn or scald, and that he suffered from the effects of said injury long prior to his term of service; but no sufficient cause of paralysis, originating in the service, is shown by the proofs; and the Department is of the opinion that your action rejecting the claim because of the insufficiency of evidence was correct.

The contention of the appeal that, by reason of the grant to appellant of a service pension under the act of January 29, 1887, he has been deprived of pension from the date of filing his original application until the date of the passage of said act, evidently arises from a misapprehension on the part of appellant and his attorney of the law governing such cases. Section 4713, Revised Statutes United States, provides in express terms that—

> In all cases in which cause of disability or of death originated in the service prior to the 4th day of March, 1861, and an application for pension shall not have been filed within three years from the discharge or the death of the person on whose account the claim is made, * * * the pension shall commence from the date of filing, by the party prosecuting the claim, the last paper requisite to establish the same.

It is thus evident that the appellant has no just cause of complaint at your action, since, even were the proof filed in support of his claim for disability sufficient to warrant its admission, his pension therefor could in no event be made to commence at the date of filing his application; and in view of the fact that the medical examination of appellant, made in 1888, revealed a disability which would only entitle him to a pension of $4 per month, it follows that the relief granted him under the act of January 29, 1887, is greater than he could receive were his said claim for invalid pension established. It must be apparent, therefore, to the appellant and to his attorney that he has received most liberal treatment by your action, of which he complains, and that were it possible to grant the prayer of his appeal, it would result in actual loss and detriment to him.

For the reason hereinbefore stated, your action rejecting this claim for invalid pension is affirmed.

OPINIONS OF MEDICAL REFEREE.

JACOB SCHULDE.

(*Motion for reconsideration.*)

Where the question involved in claim for pension requires scientific and expert knowledge, in order to give the evidence therein its just weight, the Department is driven to the necessity of relying, to a great extent, upon the judgment and opinions of the medical referee, and particularly so where such judgment and opinions are based upon a thorough medical examination.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 8, 1889.

The motion for reconsideration filed January 2, 1889, on the appeal of Jacob Schulde, has been duly and carefully considered.

When the claim was before this Department on appeal it received very careful consideration, and, on examination of all the evidence, it was found that no disability had been shown from the alleged injury of head since date of filing claim therefor, and that the deafness shown by the medical examinations of claimant could not be accepted as a result of said injury.

The attorney states in his motion that the injury to right ankle, for which the soldier is pensioned, was incurred at the same time as that at which the injury of head was received. If so, why is there no record evidence of the injury to head, and why do the medical examinations to which claimant has been subjected fail to show any scar or other evidence of such injury?

The question presented to the Department on the appeal in this claim was purely medical, namely, whether the deafness alleged by claimant and shown by medical examinations to have existed in 1884 and in 1887 could be accepted as a result of the alleged injury of head.

Where the evidence elicited to establish a pensioner's claim is not of a medical or surgical character, the Department has no difficulty in giving its judgment as to its proper bearing and weight; but where, as in the present case, the question involved is of a character requiring scientific and expert knowledge in order to give it its just weight, the Department is driven to the necessity of relying, to a great extent, upon the judgment and opinions of the medical referee, and particularly where, as in this case, such opinion is based upon a thorough medical examination.

It is not material how the injury of head was incurred, because no disability has been shown therefrom since date of filing claim therefor; and, it having been determined by the medical referee that the deafness alleged and shown is not a result of such wound, the motion herein is denied.

SEPARATE CAUSES OF DISABILITY—ATTORNEY'S FEE.

JAMES H. ALDRICH.

1. Two or more causes of disability, alleged by an applicant for an original pension, which are pending at the same time, and in which the applicant is represented by one attorney or firm, constitute but one claim.
2. The law does not contemplate the presentation of several claims for one pension, by more than one attorney, nor the allowance of more than one fee for the prosecution of one claim, except as is expressly provided in the case of a new disability.
3. The expression, "a new disability," is held to refer to a disability alleged for the first time in a declaration filed after a certificate for a portion of the pension has been granted.

Assistant Secretary Hawkins to the Commissioner of Pensions, November 30, 1888.

Referring to your report of November 16, 1888, upon the appeal of Milo B. Stevens & Co., of this city, in the matter of the fee for their services in the pension claim of James H. Aldrich, certificate No. 310619, I desire to call your attention to the conflict between the action proposed to be taken in said case and the action taken by you in the case of Calvin B. Henry, which was before the Department upon appeal of Milo B. Stevens & Co. on the 22d of August last.

A strict observance of the law in similar cases will lead to uniformity of action, which is highly desirable.

Mr. Henry had a claim for pension pending, on account of an injury to the knee, when Milo B. Stevens & Co. filed articles of agreement for a fee of $25. He afterwards filed a claim for pension on account of chronic diarrhea. Other articles of agreement with Milo B. Stevens & Co., for a fee of $25, were then filed. Upon this issue of a certificate granting pension on account of injury to the knee, a fee of $25 was paid to said attorneys. They prosecuted the claim for pension on account of diarrhea, and, upon the issue of the certificate for pension for that disability, no fee was certified, your office holding that the attorneys were bound to prosecute both parts of the claim for one fee.

The action of your office in the matter of the fee in the claim of Mr. Henry was approved by the Department.

In the case of James H. Aldrich the facts are as follows: Mr. Aldrich had a claim for pension pending, on account of a wound of the knee, when Milo B. Stevens & Co. filed articles of agreement for a fee of $25. He afterwards filed a claim for pension on account of deafness. Other articles of agreement with Milo B. Stevens & Co. for a fee of $25 were filed. Upon the issue of a certificate granting pension on account of injury of the knee, a fee of $25 was paid to said attorneys. They prosecuted the claim for additional pension on account of deafness. Upon the issue of the certificate granting the additional pension on ac-

count of deafness, no fee was certified. In your report upon the appeal of the attorneys from the action, denying them a fee upon the reissue, your office proposes to allow the contract fee.

The law provides that no agent, attorney, nor other person shall either demand or receive any other compensation for his services in prosecuting a claim for pension or bounty land than such as the Commissioner of Pensions shall direct to be paid to him, not exceeding $25.

As no person is entitled to receive more than one pension at the same time, the several causes of disability alleged in a claim for an original pension must be held as constituting but one claim. The law did not contemplate the presentation of several claims for one pension, nor the allowance of more than one fee for the prosecution of one claim, except as is expressly provided in the case of a new disability.

The expression "a new disability" is held by the Department to refer to a disability alleged for the first time in a declaration filed after a certificate for a portion of the pension has been issued. This is the sense in which it has long been used in the Pension Office, and it is presumed that the framers of the law used it in that sense. A claim for a *new* disability appears to be the only case in which the law recognizes such a division of a claim as to permit the allowance of more than one fee in an original claim for pension. To allow a fee of $25 on each part of the claim under consideration would be to allow the attorneys the sum of $50 for obtaining an original pension, which action is in conflict with the law which fixes the limit of a fee, in a claim for an original pension, at $25. It is held by the Department that the separate causes of disability alleged by an applicant for an original pension, which are pending at the same time, and in which the applicant is represented by one attorney or firm, constitute but one claim. It was not contemplated by the law that the applicant should be represented by more than one attorney or firm, or that more than one fee should be allowed for the prosecution of one claim. The presentation of claims for pension in separate parts with a view to increasing the fees of agents or attorneys should not be encouraged.

The action allowing but one fee to any one attorney or firm for the prosecution of a claim for original pension is in accordance with the established practice of the Pension Office, sustained by decisions of the Department, and is adhered to.

The action proposed to be taken in this case by your office is therefore disapproved.

OVERPAYMENT—ATTORNEY'S FEE.

JOHN ZIMMER.

Where the Commissioner of Pensions failed to direct that the full amount of the fee due to attorneys under contract be deducted from the widow's pension, which had accrued on the application of the late husband, the Department holds that the payment of said pension should be treated as an *overpayment* to the extent of the *balance* of the fee, and, therefore, the amount of said balance should be deducted from the pension the widow is now receiving, and paid to the attorney.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 12, 1889.

Herewith are returned the papers which accompanied your report of the 5th of January, 1889, upon the appeal of Milo B. Stevens & Co., of Cleveland, Ohio, from the action of your office in the matter of the fee in the pension claim of John Zimmer, certificate No. 354891.

The said John Zimmer filed his application for pension on the 2d of April, 1880. P. J. Jayne was appointed attorney in the case, but, in November, 1881, he resigned in favor of Milo B. Stevens & Co. On the 3d of September, 1884, there was filed in duplicate a contract by which appellant agreed to allow his attorneys a fee of $15 for their services upon the successful prosecution of the claim. In their statement in connection with the contract, the attorneys acknowledge the receipt of $10 on account of the fee. On the 25th of April, 1885, another contract in duplicate was filed by which claimant agreed to allow his attorney a fee of $25 upon the successful prosecution of the claim, less $10 previously paid. The claimant died on the 3d of May, 1886. The certificate for the accrued pension was issued on the 8th of April, 1887. A fee of $5 was paid to Milo B. Stevens & Co., in addition to the sum of $10 paid to them directly by the applicant. The second contract as to the fee hereinbefore referred to was overlooked, and the fee paid to the appellants was less by the sum of $10 than that to which they were entitled.

On the 23d of April, 1888, a certificate was issued granting pension to the widow in her own right.

The full amount of the pension which accrued upon the application of the invalid was paid to the widow, so that the balance of the fee can not be paid out of that part of the pension. The widow was called upon to refund sufficient to pay the balance of the fee. She has not done this. The contention of the appellants is that the case should be regarded as one in which there was an overpayment of the accrued pension to the amount of $10 and that that amount should be deducted from the current pension of the widow and paid to them in settlement of the fee.

It was the duty of the Pension Office to secure to the attorneys the true amount of their fee. As through an error on the part of the

office this was not done at the proper time, the office should, if possible, correct the error. It is conceded that the appellants are legally and equitably entitled to the balance of the fee. The widow received all the benefit of the pension which accrued on the application of the husband. On the death of the husband the accrued pension became her pension, so that there is no reason why a sum, sufficient to pay the full amount of the fee of the attorney for the prosecution of the claim for that part of her pension, may not be set off, for this purpose, from the other part of her pension.

In consequence of the failure of the Pension Office to direct that the full amount of the fee in question should be deducted from the accrued pension, the payment on that account should be treated as an overpayment to the widow to the extent of the balance of the fee, and the amount should be deducted from the pension she is now receiving, and paid to the attorneys.

You will please adjust the matter of the fee in question upon this view.

MOTHER'S DEPENDENCE.

ANNA P., MOTHER OF ABRAM SWITZ.

The conditions essential to constitute a mother's pensionable dependence are defined by section 4707 of the Revised Statutes, which provides: "That a mother shall be assumed to have been dependent upon her son within the meaning of this section if, at the date of his death, she had no other adequate means of support than the ordinary proceeds of her own manual labor and the contributions of said son, or of any other person not legally bound to aid in her support," etc.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 12, 1889.

Herewith are returned the papers which accompanied your report of December 22, 1888, upon the appeal of Anna P. Switz, mother of Abram Switz, deceased, late private, Company K, First Sharpshooters, U. S. Volunteers, from your action rejecting her claim for dependent pension.

The records of the War Department show that the above-named soldier was enrolled February 28, 1862, for three years, and that he died July 5, 1862, of wounds received at the battle of Malvern Hill, Va., July 1, 1862.

The appellant filed her declaration for pension as the mother of said soldier March 28, 1885, alleging, as the basis of her claim, that, at the time of his death, she was in part dependent upon him for support, and that he left no widow nor child surviving him. The claim was specially investigated, and, after due consideration of the testimony thus obtained, in connection with that previously filed by the appellant, the claim was rejected July 10, 1888, upon the ground that "the claimant's

husband was able to, and did, comfortably support her at the date of soldier's death."

From said action of rejection she appealed to the Department, July 24, 1888, contending that the evidence on file in her claim fully establishes her partial dependence upon the soldier at the date of his death, within the meaning of the law granting pensions to dependent mothers, and praying that said action of rejection be reversed.

Section 4707 of the Revised Statutes of the United States, which provides for a pension for dependent mothers of soldiers, expressly requires, as a pre-requisite to the grant of such pension, that it be shown that, at the date of the soldier's death, the mother was, in whole or in part, dependent upon him for support. Said action furthermore expressly defines what condition of dependence on the part of the mother will entitle her to pension under its provisions, in the following terms:

Provided, That a mother shall be assumed to have been dependent upon her son within the meaning of this section if, at the date of his death, she had no other adequate means of support than the ordinary proceeds of her own manual labor and the contributions of said son, or of any other persons not legally bound to aid in her support, etc.

A large amount of testimony was filed in this claim, and obtained upon special investigation, which it is not considered necessary to discuss in detail in this opinion, it being fully established thereby, and in fact not disputed by the appellant, that, in 1862, at the date of her son's death, she was residing with her husband and family upon a good farm of 60 acres, owned by her husband, and that the proceeds of said farm and the income derived by her husband from his trade as a cooper afforded her and her family more than adequate means of support. In fact, the evidence in the claim establishes beyond dispute that, in the years subsequent to the soldier's death, the appellant and her husband actually saved money and largely increased their means, so that, upon the death of her husband in 1885, said husband was enabled to and did leave her by will, for her natural life, real estate assessed for taxation in that year at $800, and personal property assessed at $1,800, the use and proceeds of which, she admits, she has enjoyed to the present time, and of which she is now in possession and receipt.

It is thus manifest that, at no period since the death of said soldier, has the pension provided by law in such cases been necessary as a means of adequate subsistence to the appellant; and your action rejecting this claim is therefore affirmed.

ORIGIN OF DISABILITY—LAY TESTIMONY.

HENRY HELMAN.

1. Alleged disabilities, the existence of which can not be shown at the date of soldier's discharge, and the continuance of which is not proved for years subsequent thereto, are not accepted as pensionable on account of origin in the service.
2. A disability of which there is no record either in the service or at discharge can not be proved to be due to the service by lay testimony furnished over twenty years subseqent to the alleged incurrence of the same.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 4, 1889.

I have considered the appeal of Henry Helman, Companies H and C, Fifty-fourth Pennsylvania Volunteers, of November 3, 1888, from your office decision of July 17, 1888, rejecting his application for invalid pension (No. 496558) on the ground of there being no record or other satisfactory proof on file showing that appellant, while in the United States service, contracted chronic diarrhea, and that proof adduced failed to establish the fact that, during the period between the date of his discharge and 1883, he had been afflicted with rheumatism.

The appeal raises the question only as to the correctness of the aforesaid decision.

I have examined the testimony in the case, and am unable to discover any reason for reversing your action.

The claimant alleges that he contracted rheumatism about June, 1863, and diarrhea in the spring of 1863, yet the record shows that he served until July 15, 1865, when he was discharged with his company. The case has been specially examined, and the special examiner who last had the case in charge recommended the rejection of it. Another special examiner, although recommending further examination, is of the opinion that the case was without merit. Lieut. J. B. Dunlap testified before the special examiner July 11, 1888, saying:

> When in the Army, Helman would drink on every occasion. He had the appearance when he joined our company of being a man that had been a hard drinker. I know, if I had had my way, I would not have taken him into the company.

While the claimant has a record for rheumatism from June 23 to September 29, 1863, yet the evidence fails to show that this disability existed at the date of discharge, or that it has continued to exist to the date of filing his declaration, in 1883. If claimant had suffered from some of the disabilities, as alleged, since the date of his discharge, and had contracted his disability in the service, it is reasonable to suppose that he would not have delayed for nearly eighteen years to claim the pension to which he would have been entitled if his allegations were true. He has no record for diarrhea while in the service, and the lay testimony, furnished over twenty years subsequent to the alleged incurrence, can not be accepted as satisfactorily establishing the alleged fact.

As was said by the Department in the case of Albert T. Chapin (2 Pension Decisions, p. 254):

> There is a strong degree of uncertainty in this class of testimony. * * * It is very natural that the mind of witnesses should become obscure by the lapse of time.

(See also cases of Henry W. Carpenter, 2 Pension Decisions, 230; Andrew J. McIntire, 1 Pension Decisions, 20; John W. Dodge, 1 Pension Decisions, 211; Franz Fallada, 1 Pension Decisions, 273; Arad P. Brown, 2 Pension Decisions, 88; Annie Waters, 2 Pension Decisions, 227.)

Your action rejecting the application for invalid pension is affirmed, and the papers accompanying your letter of transmittal of November 28, 1888, are herewith returned.

LINE OF DUTY.

STEPHEN G. CASE.

The Department reaffirms the rule in the cases of Ammerman, William M., (P. D., Vol. 1, p. 5); Friel, James E. (P. D., Vol. 1, p. 329); of Gillespie, Alex. (P. D., Vol. 2, p. 16); and Stillwell, Jesse M. (P. D., Vol. 2, p. 83), etc., defining the line of duty in the service.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 4, 1889.

Herewith are returned the papers which accompanied your report of November 21, 1888, upon the appeal of Stephen G. Case, late private, Company C, Twenty-seventh New York Volunteers, from your action rejecting his claim for pension.

Claimant enlisted May 21, 1861, and was discharged from the service May 31, 1863. He filed his declaration for pension December 30, 1882, alleging therein, as the basis of his claim, that, while in the service and line of duty, about March 15, 1862, he was "standing witnessing some comrades jumping, when one of the jumpers let his weight accidentally slip from his hand, and it struck me in my head over the right eye, injuring me severely."

This claim was finally rejected October 4, 1888, on the ground that "the injury of head was not received in line of duty." From said action of rejection, claimant appealed to the Department October 29, 1888, contending that he received his injury through no fault or neglect on his part, from a pure accident of a comrade, that he was in line of duty at the time of its incurrence, and is entitled to pension therefor.

The sole question presented upon this appeal, and which is decisive of appellant's right to pension, is, was he in line of duty when the injury alleged was received?

The facts alleged by the appellant in his declaration for pension may be assumed to be true, and will be accepted for the purposes of this case

as correct, since they squarely raise the vital question to be decided, without reference to the other evidence on file.

The question as to whether a soldier, who incurred an injury in the manner and under the circumstances related by this appellant, was in the line of duty, and could be pensioned therefor, has been decided by the Department in numerous cases which are identical in principle, and substantially analogous as to the facts with the claim under consideration. (See cases of Ammerman, William M., 1 Pension Decisions, 5; Jones, William, *idem*, 87; Brockenshaw, W. H., *idem*, 194; Friel, James E., *idem*, 329; Wagoner, *idem*, 338; Gillespie, Alex., 2 Pension Decisions, 16; Stillwell, Jesse M., *idem*, 83; Harding, James, *idem*, 232.)

In the leading case on this subject (Ammerman, William M., *supra*) the Department discusses this subject at length, as follows:

> There has been much vagueness of thought and looseness of expression on the subject under consideration. Some of this has arisen from the phrase "in service and line of duty" being regarded as designating the status of the man, instead of designating, as it does, his pursuit, profession, or business. Wounds and injuries producing disability or death may be incurred in the service at a time when the soldier is not absent from his command, nor in arrest, nor in pursuit of private business or pleasure, and when he has by no negligence or misconduct put himself outside of the line of duty; and yet such wound or injury may not have been incurred in the line of duty. Any injury may be received by a soldier who is entirely blameless, at the same moment of time which, under one set of circumstances, would be received in the line of duty, while under another set of circumstances it would not be received in the line of duty, the cause producing the injury and the connection of that cause with the military profession alone determining that question. Numerous illustrations of this will suggest themselves to persons who have given thought to the question and who are familiar with the almost infinite variety of circumstances under which disabilities have been incurred in the military service. One only will be given. A commander on the eve of battle is asleep in his tent. A spy, who for months has been with his forces, secretly enters his tent for the purpose of obtaining and conveying to the enemy valuable written information as to his plans of battle and the disposition of his forces, contained in orders to his officers prepared to be sent out at daylight, and which are under his pillow. In the attempt to secure the papers the sleeper is disturbed and wakes, and the spy for his own safety, and in order not to be baffled in his attempt, though no such thing entered into his original design, strikes the officer with a dagger and kills him. Here there can be no question that the soldier died in line of duty, for the death cause was connected directly with and was due to the military service. But suppose that he had been killed at the same time and under like circumstances by a thief who was after his pocket-book; the death cause would then have no connection whatever, directly or indirectly, proximately or remotely, with the military profession. His death would not in any manner be due to the service, nor would he have died in line of duty in the sense in which that phrase is used in the pension laws. In one sense, as you say, the officer in the last supposed case was in the line of duty, but not for the reasons just stated in the sense that gives title to pension. The cause of disability or of death giving title to pension must in some manner pertain to and have a natural and logical connection with the military service and to line of duty in said service.

This language applies with equal force to this claim, and is unquestionably fatal to the appellant's title to pension upon the basis alleged. Your action, rejecting the claim for the reason that the alleged injury *of appellant* was not incurred in the line of duty, is accordingly affirmed.

DEPENDENT MOTHER.

MARGARETA, MOTHER OF CHARLES NEHER.

Dependence, in the sense of requiring assistance or contributions from deceased soldier, at the time of his death, and as necessary to afford her adequate means of subsistence, is an absolute prerequisite to constitute a dependent mother in the meaning of the pension laws.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 12, 1889.

Herewith are returned the papers which accompanied your report of November 23, 1888, upon the appeal of Margareta Neher, mother of Charles Neher, deceased, late private, Company B, Second Battalion, Eleventh United States Infantry, from your action rejecting her claim for dependent pension.

The records of the War Department show that the soldier died in the service of typhoid fever, in the post hospital at Richmond, Va., September 27, 1865. The appellant filed her declaration for pension September 27, 1881, as the mother of said soldier, alleging, as the basis of her claim, that, at date of soldier's death, she was in part dependent upon him for support, and that he left neither a widow, nor a child under sixteen years of age, surviving.

The claim was specially investigated, and, upon due consideration of the testimony thus obtained, it was rejected, September 3, 1888, upon the ground that the appellant had failed to prove that she was ever dependent upon the soldier for support.

From said action of rejection, she appealed to the Department, November 2, 1888, contending that the evidence filed by her in support of her claim shows that she was dependent in part for support upon the soldier at the date of his death.

There has been a large accumulation of testimony in this claim on the question of dependence, which it is not necessary to discuss in detail at the present time. A careful review of all of said testimony leads to the conclusion that the appellant was not, at the date of the death of the soldier, nor has she been since that time, in such a condition of dependence as would require assistance or contributions from him or make the grant of a pension necessary to afford her adequate means of subsistence. Such a condition of dependence is required to be shown as an absolute prerequisite to both the original grant and to the subsequent payment of a pension by the law providing for a pension for dependent mothers. (Section 4707, Revised Statutes United States.)

It is clearly proved that, at the date of the soldier's death, the appellant and her husband were residing upon a well-improved farm of 80 acres, from which they derived not only an adequate, but even a comfortable support, and which was sold by the husband of appellant a few years after the death of the soldier for $4,000. The records of the

county of their residence, in the State of Indiana, show that, for the year 1865, in which soldier's death occurred, the husband of appellant was assessed for taxation on real estate valued at $1,380, and on personality valued at $300; and the assessment lists for the subsequent years down to and including 1870 show a gradual increase, and no diminution in the value of these possessions.

Such a state of affairs necessarily precludes the existence of such a condition of dependence upon the soldier, or the necessity for pension as an adequate means of subsistence for any period since his death, on the part of the appellant, as would entitle her to a grant of pension under the law making such provision for dependent mothers.

Your action rejecting her claim is therefore affirmed.

SPECIAL ACTS—NEW DISABILITY.

NEWTON C. RIDENOUR.

1. Where a claimant applies to Congress for a special act allowing him pension, and the same is granted "in lieu of all other pensions," the Secretary of the Interior, as well as the Commissioner of Pensions thereby loses jurisdiction of the case; and, if the aforesaid special act contain error, or fail, in claimant's judgment, to embrace all or fully the disabilities for which he seeks pension, "claimant's only relief must be obtained from Congress," and not through the Bureau of Pensions under the general laws, inasmuch as his sole right to pension exists by virtue of the aforesaid special act, which Congress only can either alter or amend.
2. A "new" disability means a disability disconnected from the disability for which pension was originally allowed. It refers to a disability the origin of which, in the service and line of duty, must be proved in the same manner as if it alone were the subject of the claim.

Assistant Secretary Hawkins to the Commissioner of Pensions, December 21, 1888.

Herewith are returned the papers which accompanied your report of December 13, 1888, upon the appeal of Newton C. Ridenour, late second lieutenant, Company F, Twenty-third Iowa Volunteers, from your action rejecting his claim for increase of invalid pension, certificate No. 164978.

The appellant, who is receiving a pension of $7½ per month for varicocele of left side, is pensioned as a second lieutenant under special act of Congress, approved June 3, 1884, which provides that said allowance shall be "in lieu of all other pensions." September 27, 1886, he filed an application for increase based on the original disability, and also rheumatism which, he alleges therein, was contracted between Fort Morgan and Mobile, Ala., about February, 1865. Subsequently so much of this claim as related to the pensioned disability was rejected by your office on the ground that the appellant was then being paid the full amount to which he was lawfully entitled; and that part thereof which embraced rheumatism was rejected on the ground that, under the provisions of said Congressional enactment, his right to an addi-

tional pension was barred. From this action appeal was taken, November 27, 1888, to the Department.

The question involved is the construction of a private act of Congress which provides as follows:

Be it enacted, etc.: That the Secretary of the Interior be, and is hereby, directed to place the name of N. C. Ridenour, late second lieutenant, Company F, Twenty-third Regiment of Iowa Volunteer Infantry, on the pension-roll as such second lieutenant, the Secretary of the Interior to rate him in accordance with such rank. The increase of pension herein authorized to commence upon the passage of this act, and be in lieu of all other pensions.

Approved June 3, 1884.

The appellant earnestly contends that it was never intended by Congress that he should be denied any and all relief under existing laws for any other disability directly attributable to his military service; that the act was merely the correction of an error committed by the adjudicating officers of your Bureau in the first instance; that the words "in lieu of all other pensions" should be construed as relating to all other pensions for the particular disability, varicocele, and be "in lieu" of the $3 therefor granted by the Pension Bureau, and not in addition to it.

I am of the opinion that the language of the act under which claimant receives his pension is not susceptible of the construction put upon it by appellant. To hold otherwise would be to permit a pensioner to draw two pensions at the same time—one by virtue of the private act of Congress, and the other under the general laws. This is clearly inconsistent with the policy of the pension laws, as well as with the direct provisions of the statute. While it may be true, as claimed by appellant, that the only question passed upon by Congress was a question of rank, yet, the Department is precluded from going back of the plain language of the statute, as it appears in the private act, to ascertain the intent of Congress, there being no obscurity in the language used and no necessity for construction. The language is clear and speaks for itself. To allow claimant to now prove a new disability and obtain a pension therefor by tacking it to his Congressional pension would be to defeat the very language of the act passed in his behalf.

A "new disability" is construed by the Department to mean a disability disconnected from the disability for which the pension was originally allowed. It refers to a disability having direct connection with some wound or disease independent of that for which a pension was in the first place granted. It refers to a disability the origin of which in the service and line of duty must be proved in the same manner as if it alone were the subject of the claim. (See the case of Milo B. Stevens & Co., 2 Pension Decisions, 236).

Claimant's only relief must be obtained from Congress, and not through your Bureau under the general laws. His sole right to pension exists by virtue of the private act referred to, and, if this act is defective in *any respect*, the power which created the act alone can cor-

rect the error. In the case of James H. Young (1 Pension Decisions p. 445), the question involved was, like the one in this claim, a question of rank. Appellant contended that he should be pensioned as a captain instead of as a private. Young had been granted a pension by a private act, approved February 22, 1887, which failed to state his rank. The Department in passing upon the case took occasion to say:

It becomes apparent that the alleged error, if it exists, can not be remedied by the Department, which has no authority to correct the mistakes which may creep into special acts of Congress. Claimant must look to Congress for his remedy, if he be entitled to one. (See *Ibid.*, 447).

The foregoing language is applicable to the case under consideration, and your action rejecting claimant's application for pension for new disability is therefore affirmed.

INSANITY—ACT OF MARCH 3, 1879.

ELLEN ROBERTS, GUARDIAN OF WILLIAM ROBERTS (INSANE).

The Department holds that "the terms of the proviso contained in section 2 of the act of March 3, 1879, excepting claims by or in behalf of insane persons from the limitation prescribed therein, have the effect of eleminating from said statute said limitation so far as all such claims are concerned"; and, therefore, where insanity is alleged as the basis of a claim for pension and it is established that said insanity was incurred in the line of duty, or by reason of military service, said claim must be adjudicated, so far as the question of *arrears* of pension is concerned, without reference to the aforesaid limitation, and as if no such limitation had ever been prescribed.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 24, 1889.

Herewith are returned the papers which accompanied your report of November 16, 1888, upon the appeal of Ellen Roberts, guardian of the person and estate of William Roberts, insane, late corporal, Company K, Second Massachusetts Volunteers, from your action rejecting her claim on behalf of said soldier for a *re-issue*, of his certificate to allow his pension for insanity to commence from the *date* of his *discharge*.

The records of the War Department show that the soldier enlisted September 17, 1861, and was discharged from the service February 22, 1864, upon a Surgeon's certificate of disability, which recites:

Spinal irritation and great debility following intermittent fever, with which he was attacked in August last. Unable to work or to stand long at a time. Unfit for invalid corps. Totally disabled.

The soldier was judicially declared to be a person of unsound mind, January 30, 1886, and the appellant, his wife, was duly appointed guardian of his person and estate. She filed her original declaration for pension, as such guardian, on behalf of said soldier, February 20, 1886, alleging that, during the summer of 1863, at Little Washington, N. C., the soldier contracted fever in the swamps, was treated therefor

at various hospitals in the service, and has, ever since his discharge, been of unsound mind and a physical wreck, caused by disease contracted in the service.

The claim was allowed May 5, 1887, and a pension of $24 per month granted the soldier for malarial poisoning, spinal irritation, and resulting mental impairment, pension to commence February 20, 1886, the date of filing the original declaration. The appellant insisting that the pension should have been made to commence at the date of soldier's discharge from the service, it was re-opened and a special examination ordered to determine, as a matter of fact, whether or not the pensioner was and had been, ever since discharge, insane from causes originating in the service, whether his insanity had been continuous or intermittent, and whether he was mentally sound at enlistment.

Upon consideration of the testimony obtained by said special examination, the former action of your Bureau was adhered to, on the ground that the evidence on file, after a thorough special examination, does not show that, at the time of the passage of the acts of January 25 and March 3, 1879, and prior to the expiration of the limitation fixed by them, the soldier was mentally in such a condition as to prevent him from making his application for pension and receiving the benefits of those acts.

From said action claimant appealed to the Department October 15, 1888, contending that the evidence shows that the soldier was of unsound mind prior to 1880, just as much as he was subsequently in 1886 and in 1887, when his pension was granted, and that arrears of pension since discharge ought to be allowed her as his guardian.

OPINION.

The question presented for decision upon this appeal relates exclusively to the right of the soldier to arrears of pension from date of discharge. He was pensioned on May 5, 1887, at $24 per month, for insanity resulting from diseases incurred in his army service, and the pension was made to begin at the date of the filing by his legal guardian of an original declaration for pension, alleging that cause, upon the ground that the evidence filed by appellant and obtained upon special examination of the claim was insufficient to establish the fact that the mental condition of the soldier had been so impaired prior to the expiration of the period of limitation fixed by the act of March 3, 1879, as to prevent him from making his application for pension.

Such a position is, in the view of the Department, not tenable. All questions relative to the prior soundness of the soldier, the incurrence of said insanity as a result of his army service, and to the present existence in a pensionable degree of said disability, have been determined in his favor by your adjudication of his claim and the grant of pension therefor from the date of filing the original declaration.

The only question that remains for discussion is whether or not the limitation fixed by the act of March 3, 1879, with regard to the time

within which an application could be filed for arrears of pension, would apply to such a claim as the present one.

The proviso to section 2 of the act of March 3, 1879, expressly says:

But the limitation herein prescribed shall not apply to claims by or in behalf of insane persons and children under sixteen years of age.

In a recent claim somewhat analogous to the one now under consideration, the Department had occasion to discuss at length the bearing and effect of the above quoted language upon claims for pension upon the ground of insanity, in deciding upon the appeal in the claim of Stabler, guardian, etc., of Henry Mulholland, (insane), (2 Pension Decisions, page 75) and, again, upon a reconsideration of said decision, at your request, reported in same volume (page 176), in which the Department adhered to its former ruling in said case. The position maintained by the Department was clearly stated in the opinion rendered upon said motion for a reconsideration of the decision, as follows:

It may be stated, however, for the purpose of making the matter more clear, if possible, that, in the opinion of the Department, the terms of the proviso contained in section 2 of the act of March 3, 1879, excepting claims by or in behalf of insane persons from the limitation prescribed therein, *have the effect of eliminating from said statute said limitation so far as all such claims are concerned.*

In other words, where insanity is alleged as the basis of the claim for pension, and it has been satisfactorily established that said insanity was incurred in line of military duty or resulted from the military service of the claimant, such claims must be adjudicated, so far as the question of arrears of pension is concerned, without reference to the aforesaid limitation as to the time within which the declaration must be filed, and just as if no such limitation had ever been prescribed. The time at which the pension must commence would then depend upon the date at which the alleged disability was shown to exist in a pensionable degree, and would resolve itself simply into a question of *rating.* Of course, if the insanity alleged as the basis of the claim was not shown to have existed in a pensionable degree *prior* to the date of filing the declaration for pension, the claimant could not be pensioned for any time prior to said date, not by reason of the fact that he had not filed his claim on or before the date fixed by the aforesaid act, but because he had failed to establish the existence of his alleged disability in a ratable degree, for the reason that this class of claims is expressly excepted from the operation of the limitation prescribed by said act.

Such being the views of the Department, it is merely necessary to inquire, in the claim at present under consideration, at what time the evidence on file shows the insanity of the soldier to have first developed in a pensionable degree, in order to determine at what date his pension should be made to commence. With this end in view, the voluminous testimony in the case has been subjected to very careful review, upon the consideration of this appeal. It would appear therefrom that the situation of the soldier, both before and subsequent to his army service, had been most favorable for obtaining information upon this sub-

ject. He is shown to have been reared and to have learned his trade of "file-cutter" at the village of Sing Sing, in the State of New York, to have returned to that place and gone to work again in the same file manufacturing establishment in which he had learned his trade, within a very short time after his discharge, and that he is at present a resident of the same place and at work in the same shop.

The testimony of his employers and fellow-workmen, who had known him from boyhood, who had seen him almost daily, and worked by his side continuously since his return from the Army, agrees substantially that the soldier's mind had been impaired ever since his return to said village, after his discharge from the Army, sometime in April, 1864. These witnesses give detailed statements of the actions and peculiar habits of the soldier, as compared with his habits and characteristics prior to his service, which conclusively establish the fact that he has been of unsound mind, to a more or less extent, during all the period of his residence in Sing Sing, since his return from the Army. This testimony is corroborated by that of the members of soldier's family, by his family physicians, and by numerous neighbors, friends, and other residents of said village, all of whom agree that he has been considered a person of unsound mind ever since. It is further apparent that he is and has been for many years employed at the file manufacturing establishment where he is now at work, from a feeling of sympathy and of charity on the part of his old employers, and as a means of pacifying him, keeping him from wandering away from home, or injuring himself, rather than from any valuable or remunerative work that he is capable of doing, the testimony showing that his earnings during all of said period have been very much less than he was able to make prior to his army service, or as compared with his fellow-workmen of equal skill, and for some years past amounting to but little.

In view of the foregoing, the Department has reached the conclusion that the soldier's insanity has existed in a pensionable degree since April, 1864, and that he is entitled to arrears of pension from that time. Your action rejecting the claim of appellant for a reissue and for arrears is accordingly reversed, and her appeal sustained.

PROOF OF INCURRENCE.

EDGAR SHROEDERS.

The unsupported allegations or statements of a claimant, as to the incurrence of an alleged injury in line of duty, can not be admitted as sufficient to establish that fact unless said allegations or statements are fully corroborated by the surrounding circumstances.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 30, 1889.

Herewith are returned the papers which accompanied your report of December 13, 1888, upon the appeal of Edgar Shroeders, late second

lieutenant, Company D, Seventy-fourth Pennsylvania Volunteers, from your action rejecting his claim for increase of pension.

The appellant alleged in his original declaration for pension, filed August 6, 1879, that he was injured in his right leg and ankle at the battle of Chancellorsville, Va., about May 1, 1863, by his horse falling with him, and that he contracted scurvy and also rheumatism in said leg while a prisoner of war in Richmond, Va.

The records of the War Department furnish no evidence relating to either the origin, or the existence in the service, of the alleged injury of right leg.

The appellant was pensioned June 27, 1885, for total *deafness* of left ear, and for depressed scars of scalp and face, result of scurvy, at the rate of one-fourth from discharge to April 3, 1884, and one-half thereafter, which rate of pension he is at present receiving. His claim for alleged injury to right leg and resulting rheumatism was rejected June 13, 1885, on the ground of no record, and inability to prove origin of same in service and line of duty.

The claim was subsequently reopened, and some additional testimony filed by appellant, upon consideration of which the above-indicated action of rejection was adhered to, April 21, 1887. From said action, rejecting his claim for alleged injury to leg, claimant appealed to the Department, August 22, 1887, contending that the evidence furnished by him, and on file, is sufficient to establish the incurrence of said injury in the service and line of duty, and that said action is contrary to law and deprives him of his just rights under the same.

Beyond the testimony of the appellant himself, there is no direct evidence on file to establish the incurrence of the alleged injury to leg at the time and place and in the manner alleged. The only testimony produced purporting to have a tendency to corroborate the allegations of the appellant is that of a brother officer, who does not pretend to swear from his own knowledge, nor from statements of the apppellant made to him either at the time or subsequently, but simply as to what was the knowledge, in regard to the matter, of the commanding general, a third person, and as to statements in regard thereto made by the general, to him, some time after the alleged incurrence of the injury. It is apparent, without argument, that such testimony is the merest hearsay, inadmissible as evidence for any purpose, and can not be considered.

It also appears to be admitted by the appellant, and incontestably shown by the evidence, that he participated in and was taken prisoner at the battle of Gettysburgh, Pa., which occurred about sixty days or more subsequent to the date of the battle of Chancellorsville, Va., where, he alleges, his injury to leg was incurred; and, although afforded the advantage of two special examinations, the last of which was ordered for the investigation of this particular point, he has been unable to furnish any evidence whatever showing that he was disabled in any degree by the alleged injury during the period that elapsed between the

two above-mentioned battles. It is thus manifest that the *unsupported* allegations and statements of the appellant, as to the incurrence of his alleged injury to leg in line of duty, can not be admitted as sufficient to establish that fact on the ground that they are corroborated by the surrounding circumstances.

For the above reasons, the Department is clearly of the opinion that the essential fact of origin in the service and line of duty of the injury of right leg, alleged and relied upon by the appellant as the basis of his claim for increase of the pension he is now receiving, has not been established by competent and satisfactory evidence, and consequently your action rejecting said claim is affirmed.

MINORS' PENSION—ATTORNEY'S FEE.

CHARLES E. FAIRMAN (ATTORNEY).

Where there are two or more minors entitled to pension and one of them dies while the claim is pending, there is no warrant of law for making any deduction from the amount of pension to be paid up to the death of that one. After the death of that minor, the survivor or survivors are entitled to the full amount of pension previously paid; and, therefore, the attorney in such claim in entitled to the full amount of fee set forth in the articles of agreement.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 22, 1889.

Herewith are returned the papers which accompanied your report of the 21st of December, 1888, upon the appeal of Charles E. Fairman, of Washington city, from the action of your office in the matter of the fee for the prosecution of the claim of the minors of John S. Schults, for pension, No. 248959.

In this case there were four minors entitled to participate in the benefits of the pension. They were, at the time of filing the application, of sufficient age to act for themselves, and they agreed with Charles E. Fairman to allow him a fee of $25 upon the successful prosecution of the claim. While the claim was pending, one of the applicants died.

The certificate granting the pension was issued on the 10th of November, 1888. A fee of $18.75 was paid to Mr. Fairman. From the action of your office refusing to allow the full amount of the fee set forth in the articles of agreement, Mr. Fairman appeals.

In the report upon the appeal your office holds that—

> There being four minors, all of whom signed and executed fee agreements for $25, each of them was chargeable with one-fourth of the contract fee of $25. In the case of the three of them surviving, Martha H., Eliza F., and David N., this sum of $6.25 was deducted from the share of each, making the total fee $18.75, which appellant received. In the case of Graham A., who died, leaving neither widow, nor child under the age of sixteen years, no payment whatever of his share of the pension was made, except so much as was necessary to re-imburse the person who bore the expenses of the last sickness and of the burial of the decedent, as provided by section 4718, Revised Statutes, and *no payment* of fee on account of his share of pension was made, *for the reason that there is no* provision of law under which it can be.

The law granting pension to the minor children of a soldier gives the pension to them jointly, (See Revised Statutes, section 4702.) When there are several children entitled to pension, and one of them dies while the claim is pending, the case does not in any respect come within the provisions of section 4718 of the Revised Statutes. Section 4718 of the Revised Statutes has no application to such a claim, so long as any one of those entitled survives.

When there are two or more minors entitled to pension, and one of them dies while the claim is pending, there is no warrant of law for making any deduction from the amount of pension to be paid up to the date of the death of that one. After the death of that minor, the survivor or survivors are entitled to the full amount of the pension which was previously paid.

On this view of the case, as Mr. Fairman fulfilled his contract to prosecute the claim to a successful issue, there is no reason why he should not be paid the full amount of the fee agreed upon.

You will please, therefore, direct the payment to him of the full amount of the fee set forth in the articles of agreement.

SERVICE PENSION—MEXICAN WAR.

BENJAMIN J. W. FRENCH.

In applications for service pension under act of January 29, 1887, it is not sufficient to show that, in response to the call for troops to go to Mexico, claimant and others left their homes and proceeded 30 or 100 miles to the place of rendezvous and of enlistment; but it must be shown also that, after said organization had been completed, it *served sixty days* on the coasts or frontier of Mexico, or en route thereto, or was actually engaged in a battle in said war.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 18, 1889.

Herewith are returned the papers which accompanied your report dated February 5, 1889, on the appeal of Benjamin J. W. French, from your action denying his claim for pension.

The said Benjamin J. W. French alleges, in a declaration filed March 8, 1887, that he served as a private in the company commanded by Capt. John H. H. Felch in the Mexican war; that he enlisted at Fort Smith, Ark., about the 16th of July, 1846, and was honorably discharged at the same place, April 15, 1847.

The records of the War Department set forth the date of enlistment and discharge at Fort Smith, Ark., as above given; and that company did not serve in Mexico, on the coast, nor on the frontier thereof, nor en route thereto.

The claim was rejected August 26, 1887, on the ground that the organization in which claimant served was not in Mexico, nor on the coast, nor frontier thereof, nor en route thereto.

An appeal was filed from this action, January 26, 1889.

OPINION.

It is contended by the appeal that, appellant having left his home in response to a call for troops to go to Mexico, and proceeded 30 miles to the place of rendezvous, where he was enlisted and mustered into the United States service under said call, he is entitled to pension under the act of Congress approved January 29, 1887.

The first section of said act provides that—

The Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension-roll the names of the surviving officers and enlisted men, including marines, militia, and volunteers, of the military and naval service of the United States, who, being duly enlisted, actually served sixty days with the Army or Navy of the United States in Mexico, or on the coasts, or frontier thereof, or en route thereto, in the war with that nation, or were actually engaged in a battle in said war, and were honorably discharged, and to such other officers and soldiers and sailors as may have been personally named in any resolution of Congress for any specific service in said war, and the surviving widows of such officers and enlisted men.

Six classes of persons are named in said act as being entitled to the benefits of its provisions, namely: officers and enlisted men who, being duly enlisted, actually served sixty days with the Army or Navy of the United States in Mexico; those who served sixty days on the coasts or frontier thereof; those who served sixty days en route thereto in the war with that nation; those who were actually engaged in a battle in said war, irrespective of length of service; those who may have been personally named in any resolution of Congress for any specific service in said war; and the surviving widows of such officers and enlisted men.

To one of these classes, therefore, the appellant must belong, if entitled to pension under this act.

The records of the War Department show that the command to which appellant belonged was never in Mexico, and did not serve there during the war; nor does the appellant contend that it did.

If, therefore, appellant is entitled to pension under this act, it must be in consequence of being included in the second or in the third class of persons entitled to its benefits, and therefore he must prove that he served for sixty days on the coasts or frontier of Mexico or en route thereto during said war.

It appears from the records of the War Department that appellant was enlisted as a private in a military organization known as Gray's Battalion, Arkansas Mexican War Volunteers, and that said organization was raised in the State of Arkansas, and organized at Fort Smith, in said State, but was never under orders to proceed to the seat of war with Mexico, nor to proceed from the place where the appellant was enlisted to any other place, nor to change its station during the service of the soldier.

It is not sufficient that, in response to the call for troops to go to Mexico, appellant and others left their homes and proceeded 30 or 100 miles to the place of rendezvous and enlistment, but it must be shown

also that, after said organization had been completed, it served sixty days on the coasts or frontier of Mexico, or en route thereto.

It is plain, therefore, that the appellant can not be regarded as having served sixty days on the coasts or frontier of Mexico in the war with that nation.

For the above reasons your action is approved, and the appeal denied.

PRESUMPTIVE EVIDENCE—RECORD EVIDENCE.

HENRY SMITH.

1. Where there is a hospital record showing the incurrence, existence, and treatment of a pensionable injury in the service, the origin of which, in the line of duty, is claimed by soldier, there being no evidence adverse to such claim, the presumption is that said injury was incurred in the line of duty, as alleged, and as indicated by the hospital record.
2. The rule is re-affirmed that "the record made of treatment in hospital during service is presumed to be correct, as showing all the diseases and all the treatment which claimant had during army service; and it is further to be presumed that he was not treated for any disease other than that therein stated; and these presumptions will obtain until the contrary is clearly and satisfactorily established by competent evidence."

Assistant Secretary Hawkins to the Commissioner of Pensions, February 18, 1889.

Herewith are returned the papers which accompanied your report of February 9, 1889, upon the appeal of Henry Smith, late private, Company L, First Ohio Cavalry, from your action rejecting his claim for pension.

The appellant filed his original declaration for pension September 18, 1885, alleging as the basis of his claim the incurrence of a rupture and an injury of the breast in the service and line of duty, caused by having been thrown from his horse at Lookout Mountain, Tenn., at the commencement of the engagement. In a subsequent affidavit, he states he was ruptured upon both sides.

The War Department records show that the appellant enlisted in the First Ohio Cavalry, January 5, 1864, and was discharged June 9, 1865; also that he entered Cumberland General Hospital at Nashville, Tenn., July 9, 1864, with chronic diarrhea; Crittenden General Hospital, Louisville, Ky., on the following 13th of December, with acute dysentery; Seminary General Hospital, Covington, Ky., on the 27th of the last-mentioned month, with a fracture of the sternum (breast bone), caused by an accidental fall from his horse on the preceding 1st of March; and the Main Street General Hospital, Covington, Ky., April 29, 1865, with the same fracture.

At Marietta, Ohio, October 27, 1886, claimant was medically examined by the board of surgeons, who rate him 12–18 for "double hernia," and one-half total for "injury of breast."

The claim was specially examined, and, after due consideration of the evidence procured thereby, was originally rejected, August 9, 1887, on the ground that the proof adduced failed to establish the fact that the appellant while in the line of his military duty was injured as alleged in his declaration. Subsequently the claim was re-opened, further considered and, on February 16, 1888, again rejected upon the same grounds as formerly.

From said action of rejection, he appealed to the Department January 23, 1889.

It appears from the evidence on file that the appellant is a very ignorant man, with but a limited degree of natural intelligence; and his statements relative to the incurrence of his alleged injuries, and to the time and place when and where the accident occurred, to which he ascribes his present disabilities, are consequently somewhat confused and incoherent.

The statements of the appellant are the only direct testimony on file as to the fact of the occurrence of the accident itself, or as to the circumstances connected therewith; and he accounts for his inability to procure the testimony of officers and comrades, as to said accident, by stating that he was serving at the time with a detachment from another company of the same regiment. However this may be, it is sufficiently certain from the evidence that the appellant was a sound, able-bodied man at his enlistment; and that he sustained, while in the service, an injury to breast, as alleged, from an accidental fall from his horse, is also clearly shown by the above-quoted official record of his admission to and treatment therefor in hospital, which record fixes the time of the occurrence of said accident near the date alleged by the appellant. Under these circumstances it is not to be presumed, as has apparently been done in adjudicating this claim, that in the absence of any direct proof, except his own statements, showing that said accident occurred while the appellant was in the performance of some act of military duty, it did not so occur, and that the appellant was not in line of duty. In the absence of anything to show the contrary, the presumption is just the other way. Here appellant is shown to have been a cavalry man. He alleges the incurrence of injuries by an accidental fall from his horse while in the line of duty. The record shows him to have been treated in hospital for injuries so incurred, and fully corroborates his statements as to the cause of said injuries. Nothing appears that has a tendency to raise a suspicion that the said injuries were incurred in any other manner than as alleged by the appellant, and as recited in the record, and they will be presumed to have been incurred in the line of duty.

Your action rejecting appellant's claim for injury to breast is, therefore, reversed, and you are directed to grant him pension therefor at such rate as the extent of his disability from said injury may warrant, and as may be in accordance with the rules and regulations of your *Bureau.*

With regard to the claim of appellant for double hernia, the exact converse of the proposition just discussed will apply. He ascribes the alleged hernia to the same accident that caused injury to breast, and alleges it was incurred at the same time. One comrade testifies that he saw appellant's hernia in the service and while an inmate with him in hospital. The above cited record, however, while explicitly reciting the existence and treatment for the injury to breast, as the result of said accident, is entirely silent as to said hernia. The presumption arising from such a record is as strongly adverse to the appellant's claim for hernia as we have just seen it to be favorable to his claim for injury of breast. It is a well-settled and long established rule of the Department, that "the record made of treatment in hospital during service is presumed to be correct, as showing all the diseases and all the treatment which a claimant had during army service; and it is further to be presumed that he was not treated for any disease other than that therein stated; and these presumptions will obtain until the contrary is clearly and satisfactorily established by competent evidence." See case of Ellis, Luther (1 Pension Decisions, page, 387), for full citation of decisions on this subject.

The testimony of a single comrade, above mentioned, is not deemed sufficient to overthrow the adverse presumptions arising from the aforesaid record, under the rule above quoted, and, consequently, your action rejecting appellant's claim on account of double hernia is affirmed

---

LINE OF DUTY—CONTRIBUTORY NEGLIGENCE.

CHALKLEY, ALIAS T. C. MILBOURN.

Where a disability, pensionable in degree, is incurred in the service, the contributory negligence on part of the soldier which should be shown, in order to take the case out of the line of duty, must be of such character as is recognized as *gross* negligence, which is defined to be "the want of that care which every man of common sense, however inattentive, takes of his own property or person." [1 Chitty on Contracts, p. 662.]

Assistant Secretary Hawkins to the Commissioner of Pensions, February 19, 1889.

I have considered the appeal of Chalkley Milbourn, alias T. C. Milbourn, Company C, One hundred and forty-third Ohio Volunteer Infantry (No. 329, 653), of November 19, 1888, from your decision of February 16, 1886, rejecting his claim for pension on the ground of "no record of incurrence of alleged hernia in line of duty, and the inability of claimant to prove the fact."

The Department sustained the aforesaid action of your office on appeal, June 23, 1887, upon the ground that the testimony of claimant before special examiner showed he was guilty of contributory negligence. The Department, in deciding the case, based the rejection upon claim-

ant's testimony as will appear from the following extract from the decision of that date:

The claimant's own admission before special examiner, on December 8, 1885, is fatal to his case. He says he and a comrade were cleaning the cannon-balls lying around, putting them in piles, and they threw them from their shoulders as a means of displaying their physical strength and muscular power. Claimant says he got a heavy cannon-ball, and getting near the pile threw it with full force over his shoulders backwards. By this action he was ruptured. It will be clearly seen that claimant was guilty of contributory negligence, and his injury was the result of his own carelessness and foolishness. It has been repeatedly held, for such injuries no pension can be granted. Had the injury been received while performing the same duty, but while observing ordinary care and discretion in handling the projectiles, the claimant would have been entitled, having received the injury in line of duty and without the element of contributory negligence on his part.

You state in your letter of transmittal, February 11, 1889, that "the present appeal is in the nature of a request for reconsideration of the question involved in the appeal, it being *res adjudicata*." I do not so regard it. The doctrine of *res adjudicata* is no bar to proceedings on the part of either a plaintiff or a defendant to set aside a judgment where the reason assigned is either "fraud" or "mistake;" and even a judgment may be attacked collaterally upon the ground of "fraud." The theory of the appellant is in effect that his testimony, as presented by the special examiner, was fraudulent—that he never gave the testimony attributed to him by the special examiner.

The appellant now presents the question as to whether the evidence upon which his claim was rejected by your office and affirmed by the Department was the evidence given by himself before the special examiner. He denies that he gave the evidence as quoted in the aforesaid opinion, or that he in any manner indicated to the special examiner that he was engaged in displaying physical or muscular power when he incurred his disability. He charges in his affidavit, which is corroborated by other witnesses, misconduct on the part of the special examiner who first examined claimant, December 10, 1885, whereupon your office ordered another examination. Referring to the testimony taken, which claimant alleges to be a perversion of his testimony before the special examiner, it appears that he testified as follows:

While at Fort Slocum, I was engaged with my company in artillery drill and as guards, and when I was hurt, about the 6th of June, I was on detail doing police duty—clearing up the grounds. There were 12 and 25 pound cannon-balls scattered over the grounds, and I and, I think, Sylvanus Wells were carrying off the cannon-balls; and, feeling pretty good, we would run with the heavy balls, and getting a few feet from where we were to put them, would throw them off our shoulders into the pile, not being particular to get near the pile, but displaying our strength by throwing them quite a distance. When I got hurt I had a heavy ball on my shoulder, and, getting near the pile, threw it with force over my shoulder backwards, and in doing so slipped and partly fell, spraining my back and producing the rupture or hernia. At first I knew I was hurt, but did not know how badly, and did not, that I now remember, mention it to my companion; but in about half an hour afterwards, feeling pain in the right groin, I went to Dr. Batten and told him what had happened, and that I thought I had hurt myself. He then examined me and found that I was ruptured.

Claimant testifies in supplemental examination, December 17, 1888, as follows:

I was ruptured at Fort Slocum, near Washington, D. C., on the 6th of June, 1864, under the following circumstances:

I was ordered on police duty for the purpose of clearing up our camp ground, so as to be ready for inspection. At the time I was ruptured I was carrying off and piling up cannon-balls of various sizes, ranging in weight from 6 to 50 pounds. We were feeling pretty good, and picked up the smaller balls, tossing them from where we stood, or from some convenient distance, on the pile. There were three of us engaged on this work—Frank Conser, Sylvanus Wells, and myself.

John Fife was sergeant in charge of the squad.

(Claimant exhibits a diary which he alleges was kept by him whilst in service. Under date of Monday, June 6, appears the entry, "This day on detail police duty, Frank Conser, Sylvanus Wells, and myself; in carrying off cannon-balls, I hurt myself. Dr. Batten said it was rupture. John Fife boss of squad.")

When it came to carrying off the heavy balls I picked them up and put them on my shoulder and carried them to the pile. I had a 50-pound ball on my shoulder, probably the third heavy ball I had carried, and walked up to the pile of balls, when I got there I turned partially around with my left side to the pile of balls, and, in making the half turn, I stumbled over something and fell backwards, partly on the pile of balls and partly on the ground. I felt a stinging pain at the instant, and opened up my pants and saw that there was something wrong. There was a lump there which had never been there before. My right testicle had always been up in the groin until that time, and when I looked I discovered that the testicle had come part way down and the entrails with it. I showed it to Conser at the time, and then with Conser went to see Dr. Batten, who was but a short distance away at the time. Dr. Batten pronounced it a case of rupture.

I did not throw the ball on the pile, and had made no effort to do so; I was simply turning the side or shoulder on which I had the 50-pound ball towards the pile for the purpose of dropping the ball on the pile. I had no intention of tossing the ball either backwards or forwards, and was only anxious to get rid of it. I had not been tossing or trying to toss any of the large balls on the pile, and the only ones we did toss were the lighter ones, 6, 8, and 10 pounds.

I allege positively, and without any concealment of facts or any mental reservation, that I was ruptured as I have detailed the facts to you, and was not trying feats of strength or making sport of the work when I was ruptured.

Q. Did you tell a different story to Special Examiner Smith?—A. No; although when he read the statement which he had written down as mine I found he had put it in different language and form from what I had told him. I remember, when he read the part which related to throwing the ball backwards off my shoulder, I objected to it, and told him that was not what I had said, and that I did not want any statement that was not true; more than that, I told him that the way he had put it would prejudice my claim, and would seem to make me responsible.

Mr. Smith said, "It won't make any difference," and then went on to relate a ruling of General Black which would put me in line of duty anyhow, and said I could thank Mr. Black for his ruling; went on to show that he was not strict on this point, as other Commissioners had been. I, however, insisted on him changing the language to suit the facts, and made the request twice, but he each time said it would make no difference.

When Mr. Smith took my testimony he came into the sample-room of the hotel. I was sitting at a table, awaiting his coming. He came in from the bar-room and put his grip-sack between us, sat down at the table, and began writing. His grip-sack was open, and in it was a pint flask full of whisky. During the time he was engaged taking my testimony, he took out the flask and drank at least four times. He probably drank one-half or two-thirds of the contents whilst he was engaged on *my statement.*

Both special examiners who took claimant's depositions report his reputation good, and both agree that the case is meritorious, as showing that claimant contracted his disability at the time and place above stated. Claimant's testimony is corroborated by three other witnesses. Dr. B. C. Batten testifies before special examiner December 18, 1888, as follows:

I was a practicing physician when I enlisted, and was a sergeant (fifth) in the company. I was acquainted with the claimant before he enlisted—not so intimately, however, as to know much about him. I remember that he was ruptured in service, at Fort Slocum, along in fore part of June. We left for the front on the 7th of June, and it was shortly before that. There was detail a made to remove some cannon-balls that were lying around the fort, and claimant was one of the detail, but I can not be positive as to the others. I was not on duty that forenoon, and was looking at the men remove the cannon-balls, and talking to the guards around the fort. I noticed the men picking up cannon-balls, putting them on their shoulders and carry them to a pile towards one corner of the fort, and when they got to the pile would lean forward and let the balls drop from their shoulders on the pile. The balls were of different weights, running from 6 to 40 pounds probably. I did not see claimant or any of the others try to toss the balls on the pile. They were working methodically when I saw them.

I went back to my tent, and some time afterwards, probably two or three hours claimant came to my tent and said there was something wrong, and took down his pants and I found he was ruptured through the abdominal ring on the right side—what is called inguinal hernia. I asked him how he got hurt, and he said that in carrying the balls his feet slipped and threw him off his balance and caused the rupture. I noticed that the testicle on the right side was up farther than the other, but supposed it was from stricture caused by the clasping of the abdominal ring. I reduced the rupture and made him lie down. I had no truss for him. The next morning I had a bandage made for him. It was not an old rupture—I am sure of that. The conditions all indicated a new rupture.

A special examiner named Smith—I do not know what his initials are—took a deposition from me in this case on the 9th of December, 1885. I know he was under the influence of liquor when he took my deposition, because he showed the effects of liquor and I know he took two drinks, one with me before he began taking my testimony, and he showed evidence of having been drinking before he came here. He came here in the evening from Hanoverton. He had a quart bottle of whisky and gave me a drink from the bottle. He staid all night with me (I own this hotel), but took my deposition that night. He did not read my deposition, and I did not know the contents when I signed it. I wanted him to read it to me, but he said it was all right. The next morning, when he read Milburn's testimony to him, I said to him, "Mr. Smith, I wish you would read mine; as Milburn is objecting to his you may have some part of my testimony wrong." He said, "Never mind, doctor, that is all right," and did not read my statement. I saw him take two or three drinks that morning.

Milburn objected to some part of his testimony as Smith had it written; that part which made it appear that he and the others were playing ball with the cannon-balls, tossing them to the pile instead of carrying them. Smith said that was "all right," and did not make the alteration claimant desired. Claimant objected at the time to the statement on the ground that it was not a true statement of facts; that they were not and had not been tossing balls in play, and that he wanted the correction made to suit the facts.

I am clearly of the opinion that the evidence presents a case for pension, and that the fact is satisfactorily established that claimant contracted his alleged disability in line of duty. I am still further of opin-

ion, on reconsideration of the case, that the testimony of claimant at the first examination does not establish such a case of gross negligence as would come within the decisions of the Department as applied to similar cases. It is unmistakably shown that the man was engaged on a regular detail to police the camp; that while engaged in the performance of that duty he received the injury. The negligence upon his part to take the case out of the line of duty would have to be shown to be of such character as is recognized as gross negligence, which is defined to be "that want of care which every man of common sense, however inattentive, takes of his own property or person." (See 1 Chitty on Contracts, p. 662.)

Claimant's supplemental testimony on his second examination leaves no room for doubt upon this question, provided his testimony is entitled to belief. The record is perfectly consistent with claimant's allegation and testimony.

The record of the Surgeon-General's office shows he was admitted to depot hospital at Point of Rocks, Va., June 13, 1864, with hernia, and that he was subsequently admitted to McClellan General Hospital, July 5, 1864, for inguinal hernia.

The decision of your office rejecting the claim is reversed, as is also the departmental decision of June 23, 1887; and the papers in the case accompanying your letter of transmittal, February 11, 1889, are herewith returned.

MINORS' PENSIONS—MILITIA SERVICE.

MINORS OF HAMILTON S. WILSON.

1. A member of the militia of any State, serving under the orders of an officer of the United States, can not be pensioned for disabilities incurred in the line of duty, unless his claim was prosecuted to a successful issue prior to July 4, 1874. (Section 4702, Revised Statutes.)
2. The limitation, as to the period within which the claim of a State militia-man can be prosecuted to a successful issue, is directly imposed by section 4702, Revised Statutes, upon the claim of his minor children, and there is no portion of any law that repeals or in any manner modifies this provision of said section.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 14, 1889.

Herewith are returned the papers which accompanied your report of the 6th of February, 1889, upon the appeal of Charles and William B. King, of Washington City, from the decision of your office rejecting the claim of the minors of Hamilton S. Wilson, No. 344843.

This claim was filed on the 16th of September, 1886. It is alleged that the father of said minors was a member of Company C, of the Eighty-seventh Regiment of the Enrolled Missouri Militia, and that he died May 16, 1864, of wounds received in such service. It is alleged that their mother died in 1872. She did not apply for a pension.

The report of your office upon the appeal sets forth that the claim was rejected upon the ground that "the Eighty-seventh Enrolled Missouri Militia was a State organization, and disabilities incurred therein are not pensionable under existing laws."

From this action the appeal is taken.

It appears from the report of the Adjutant-General, U. S. Army, that "the Eighty-seventh Regiment of the Enrolled Missouri Militia was not in the service of the United States."

The law under which this claim is presented is contained in section 4702 and that paragraph of section 4693 of the Revised Statutes which provides pension for "any person not an enlisted soldier of the Army serving for the time being as a member of the militia of any State, under the orders of an officer of the United States, * * * disabled in consequence of wounds or injuries received in the line of duty in such temporary service." It is provided in said section that the claim of a State militia-man shall not be valid unless prosecuted to a successful issue prior to July 4, 1874.

If the father of the claimants had been disabled by a wound received in the line of duty while he was serving with the Enrolled Missouri Militia under the orders of an officer of the United States, he would not have been entitled to pension for such disability unless his claim for such pension had been prosecuted to a successful issue prior to the 4th of July, 1874.

Section 4702 of the Revised Statutes provides that—

> If any person embraced in the provisions of section forty-six hundred and ninety-two and forty-six hundred and ninety-three has died since the fourth day of March, eighteen hundred and sixty-one, or hereafter dies, by reason of any wound, injury, or disease, which *under the conditions and limitations of such sections would have entitled him to an invalid pension had he been disabled*, his widow, or if there be no widow, or, in case of her death, without payment to her of any part of the pension hereinafter mentioned, his child or children, under sixteen years of age, shall be entitled to receive the same pension as the husband or father would have been entitled to had he been totally disabled. * * *

One of the conditions under which a member of the militia of any State, serving under the orders of an officer of the United States, was to be allowed pension was that his claim should have been prosecuted to a successful issue prior to July 4, 1874. Those who claim pension on account of the death of the person who performed the military service have no rights under section 4693 superior to those which he had. If the person on whose account this claim is made had been disabled by a wound received in the line of duty while he was serving as a member of the Enrolled Missouri Militia under the orders of an officer of the United States, and had survived until the present, he could not be pensioned upon an application and proof now presented, or presented at any time after the 4th of July, 1874. The claim of the widow and that of the children are subject to the same limitation in this respect as that to which his claim would have been subject.

The limitation as to the period within which the claim of a State militia-man can be prosecuted to a successful issue is thus directly imposed by section 4702 of the Revised Statutes upon the claim of his minor children, and there is no other portion of the law which repeals or in any manner modifies this provision of said section.

As the claim under consideration was not presented and prosecuted to a successful issue within the time fixed by the law, the decision of your office rejecting the same is affirmed.

RESTORATION—SPECIAL ACTS.

LACHLAN L. MCINTOSH.

Where a claimant is restored to the pension rolls by a special act of Congress wherein the rate, the commencement, and the duration of the pension are expressly fixed, the same can not be varied by the provisions of the general pension law, and the pensioner can not be paid for any time anterior to that specified for such payment by the special act, nor can he obtain relief under the general law, unless he be relegated to the status that he formerly occupied as a claimant by the repeal of the said special act, and shall thereupon make his application for pension in the ordinary way.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 14, 1889.

Herewith are returned the papers which accompanied your report of February 8, 1889, upon the claim of Lachlan H. McIntosh, late captain's clerk, U. S. S. *Scourge*, as appealed from your action rejecting his claim for restoration of his service pension as a survivor of the Mexican war, under the act of January 29, 1887, from the date of his being dropped from the rolls.

The appellant was granted a pension under the act of January 29, 1887, in July, 1887, from the date of the passage of said act.

The payment of said pension was suspended in November, 1887, and claimant was dropped from the rolls in February, 1888, upon the ground that he was not in the service as an "enlisted" man, nor as an "officer," within the meaning of said act. Appellant then applied to Congress for relief, and, by virtue of a special act passed in his behalf and approved September 1, 1888, his name was again placed upon the roll of pensioners under said act of January 29, 1887, at the rate of $8 per month from the date of approval of said special act of Congress directing his restoration to the rolls.

From said action of your Bureau he took this appeal January 28, 1889, contending that he is entitled to a continuous pension under the act of January 29, 1887, from date of suspension of his original pension

to the date of restoration of his pension under the aforesaid special act of Congress.

The special act of Congress under and by virtue of which the appellant was restored to the rolls as a pensioner under the act of January 29, 1887, is in the following terms:

AN ACT for the relief of Lachlan H. McIntosh.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed to restore to the pension-rolls the name of Lachlan H. McIntosh, late captain's clerk, U. S. S. *Scourge*, war with Mexico, the restoration to take effect from and after the passage hereof.

Under the view of the law, as held by the Department in its recent decision in the case of Richard H. Sinton (2d Pen. Decisions, page 320), wherein it was decided that captains' and paymasters' clerks in the Navy were *officers* within the meaning of that term as used in the act of January 29, 1887, and as such entitled to the benefits of said act, the action of your office in originally suspending the payment of appellant's pension and subsequently dropping him from the rolls was undoubtedly erroneous; and had he not applied to Congress for relief, he would unquestionably be entitled to restoration from the date at which the payment of his pension was suspended, as contended by him in this appeal. He was not, however, as he urges, forced by your erroneous and mistaken action to seek relief at the hands of Congress, for the reason that he had not, at the time that he did so, exhausted the remedies afforded him under the law, and he might have appealed from your action to the Department, as did Sinton under similar circumstances, and with like result. He chose, however, to seek relief in a different manner, and, having made choice of the tribunal to which he would submit the final adjudication of his rights, he must be held, by every principle of law, equity, and justice, to abide by the decision of said tribunal.

The special act of Congress under and by virtue of which he is now drawing a pension expressly and distinctly provides that his restoration to the pension rolls, therein directed, "shall take effect from and after its passage."

Section 4720, Revised Statutes United States, provides—

When the rate, commencement, and duration of a pension, allowed by special act, are fixed by such act, they shall not be subject to be varied by the provisions and limitations of the general pension law, etc.

Section 4 of the act of January 29, 1887, under which the appellant claims restoration, provides—

That the pension laws now in force, which are not inconsistent or in conflict with this act, are hereby made a part of this act so far as they may be applicable thereto.

The above are plain, unequivocal, and positive provisions of law, and place the position maintained by this appeal beyond the pale of argument.

The appellant is at present a beneficiary under the act of January 29, 1887, solely by virtue of a special act of Congress restoring him to the rolls as such, and expressly providing that such restoration was to date from the passage of said special act. The act under which he draws his pension provides that the general pension laws not inconsistent therewith shall be applicable to pensioners thereunder. The general pension laws provide that when the commencement of a pension is fixed by a special act of Congress it shall not be varied by the provisions and limitations of the general pension laws.

It is thus manifest and incontestable that, so long as the appellant continues upon the roll of pensioners under said special act, he can not be paid for any time anterior to the date of its passage, as therein provided, nor can he obtain the relief he now seeks until he is relegated to the status that he formerly occupied as a pensioner under the general laws, by the repeal of said special act of Congress, and makes his application therefor in the ordinary way.

For the above reasons, your action rejecting his claim for restoration is affirmed.

BOUNTY-LAND RIGHTS.

DANIEL S. LOCKRIDGE.

Where it appears that, under the law as it existed before the passage of the Revised Statutes, a claimant was entitled to bounty land, the Department holds that his right thereto still exists, inasmuch as section 5597 of the Revised Statutes provides that the repeal of the several acts embraced in said revision shall not affect any right under the laws thereby repealed, but such rights shall exist in the same manner as if said acts had not been repealed.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 11, 1889.

Herewith are returned the papers which accompanied your report of the 16th of November, 1888, upon the appeal of Dudley E. Lockridge from the action of your office rejecting his claim for bounty land, No. 335836.

It appears from your report that the rolls of Captain Crenshaw's company of Missouri militia, on file in the Pension Office, show that D. S. Lockridge served from October 24, 1837, until November 9, 1837, a period of seventeen days.

On the 16th of April, 1883, Mr. Lockbridge filed an application for bounty land in which he alleged that he was in actual service for fourteen days in Captain Crenshaw's Company in the war against the Osage Indians; that he volunteered at Independence, Mo., on the 24th of October, 1837, and was discharged at that place on the 9th of November, 1837.

The claim was rejected by your office on the ground that the Osage Indian disturbances did not constitute a state of actual Indian warfare.

From this decision the appeal is taken.

It appears that some land warrants were issued to members of the Missouri Militia for service rendered at the time of the Osage Indian disturbances. The attention of your office having been called to this fact by the attorney in the case, he was informed that "land warrants were allowed for this service under a provision of the act of March 3, 1855, which granted land for services of militia and volunteers not rendered in war, which claims are now adjudicated under section 2425 of the Revised Statutes, which requires that service, to give title, shall have been rendered in war."

If the applicant was entitled to bounty land under the law as it existed before the passage of the Revised Statutes, his right thereto still exists, as section 5597 of the revised Statutes provides that the repeal of the several acts embraced in said revision shall *not* affect any right under laws so repealed, but such right shall exist in the same manner as if said acts had not been repealed.

It was held by the Attorney-General of the United States in his opinion, dated December 14, 1855, that the act of March 3, 1855, provided for—

> Two classes of militia or volunteers, to wit, first, such as shall have been regularly mustered into the service of the United States in any war, and which, therefore, notwithstanding they were militia or volunteers, had, by the fact of such muster, become troops of the United States; and, secondly, such volunteers or militia as shall have been called into military service and regularly mustered therein, whether in time of war or not, and whether originally mustered by the United States or not, but whose service, though it were in form that of State troops only, in its origin, yet shall have been subsequently paid for, that is, legally adopted as service of the United States.

This opinion was accepted by the Department to determine its action in claims like that under consideration. The only question in the case is, therefore, whether the service of this applicant as a member of the Missouri Militia at the time stated was paid for by the United States. By an act of Congress approved June 9, 1860, an appropriation was made to re-imburse the State of Missouri for expenses incurred in repelling the invasion of the Osage Indians in 1837.

It does not appear from the evidence in this case whether Captain Crenshaw's company was one of the organization whose service was paid for ultimately out of the appropriation made by the act of June 9, 1860. If such was the case the applicant is entitled to bounty land.

You will please adjudicate the claim upon the views herein set forth.

DEPENDENT FATHER'S CLAIM.

PATRICK O'HARE.

Where, in the case of a father's claim for pension on the ground of dependence upon deceased soldier, it appears that claimant was disabled at the time of the son's death, and was thereby rendered actually dependent upon the son, in the adjudication of the claim it is irrelevant and immaterial what caused claimant's physical disability, or whether it was or was not the result of his own vicious habits. The law makes no discrimination, and the Department is not authorized to interpolate a disqualification which the law (section 4707, Revised Statutes) does not impose.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 11, 1889.

I have considered the claim of Patrick O'Hare, father of James O'Hare, *alias* Henry J. Baker, deceased, Company F, Sixth Vermont Volunteers (No. 232,554), the same having been brought on appeal December 26, 1888, from your office decision of December 5, 1877, rejecting his claim for father's pension upon the ground that he was "non-dependent upon the soldier for his support during his life-time, and that his present disability is the result of his vicious habits."

The evidence shows that claimant, at the date of the death of his son, who was killed in action June 6, 1864, was fifty-seven years of age, poor, and physically disabled, being partially blind; that he owned no property, real or personal, and relied upon his daily labor for his subsistence. The evidence further establishes kinship; death of soldier's mother; that he left no widow or child surviving him; that he was a minor at the date of his death, being but seventeen years of age; that he contributed money for the support of his father while in the service.

The only question to be considered is whether the disability of the father is of such a nature as to preclude him from the benefits of the pension laws.

One witness testifies, saying:

I have been professionally acquainted with Patrick O'Hare from 1861 to the present time, and I know that he has been continuously partially disabled from earning his living by manual labor during said time, by reason of the following described disabilities: From the effects of syphilis, contracted in 1850. The disease almost destroyed his eyes, he can see but dimly; as age increases, his disability increases.

Luther Ainsworth testifies, saying:

I treated the said Patrick O'Hare about thirty years ago for blindness; he at that time could not see any thing, even to distinguish light; and, under my treatment as a doctor, partially recovered his sight, although up to this time he is not able to read, and it is probable he will never recover, but grow worse. He (said O'Hare) worked for me in 1865, for which I paid him 50 cents a day, and could only work in good weather, and made only 14 or 15 days a month, while I paid other hands at work for me then $1.50 a day.

Witness Underwood testifies to claimant's condition at the time he delivered $10 sent home by his son from the Army in 1863, and that claimant "was blind when I took it to him."

Witness Capron also testifies to claimant being "almost blind, while his son was in the Army," and that "his habits during said period were 'good' and would 'average with the generality of people.'"

Witness Moriarty testifies that claimant was partially blind, and unable to labor from said blindness, while his son was in service.

Joseph Willis and wife testify that, "during and previous to 1864 and ever since that time claimant, has been and still is partially blind," and "unable to support himself"; and Joseph Willis, in a separate affidavit, testifies that claimant at time of his son's enlistment was suffering with "erysipelas in his eyes, and rheumatism."

The medical examination in 1877 showed claimant one-half disabled.

The foregoing testimony shows that claimant was disabled at the time of the son's death. It is irrelevant and immaterial what caused claimant's physical disability, or whether it was or was not the result of his own vicious habits. The Department is not called upon to pass upon that question. The law makes no discrimination, and the Department is not authorized to interpolate a disqualification which the law does not impose.

The only condition imposed by section 4707, Revised Statutes, is, that the father shall be dependent in whole or in part upon his son for support at the date of his death. It was not designed nor does the law authorize the inquiry into the cause which produced the physical disability, resulting in dependency.

A clear distinction exists between cases where the father is poor and disabled, unable to procure an adequate support by reason of his physical disability, and the case wherein the father, being able-bodied, neglects or refuses to labor, to the extent of his natural physical ability.

For the reasons herein indicated, your action rejecting the claim is reversed, and you will proceed to adjudicate the same in accordance with the rule of the Department as herein announced.

The papers accompanying your letter of transmittal of January 9, 1889, are herewith returned.

DEPENDENCE—FATHER.

LOUIS DARVEAN.

The Department holds that, in order to establish proof of a father's dependence, in a pensionable degree, upon a deceased soldier, "it must be shown that, at the date of the death of the soldier, the father had no other adequate means of support than the contributions of his son, or of any other person not legally bound to aid in his support, and that he was unable to derive from his own actual or possible manual labor sufficient income to furnish him means of adequate support; and, furthermore, such pension, even if granted, can not be paid except during such period as the evidence may show it to be actually necessary as a means of adequate subsistence." (Section 4707, Revised Statutes of the United States.)

Assistant Secretary Hawkins to the Commissioner of Pensions, February 11, 1889.

Herewith are returned the papers which accompanied your report of February 5, 1889, upon the appeal of Louis Darvean, father of Louis D. Darvean, deceased, late sergeant, Company B, First New York Light Artillery, from your action rejecting his claim as dependent father.

The records of the War Department show that the soldier was enrolled August 7, 1861, was killed in battle at Gettysburgh, Pa., July 3, 1863, and that at the date of his enlistment he was nineteen years of age.

The appellant filed his declaration for pension as dependent father of the soldier, April 21, 1879, alleging that, at the time of the soldier's death, he was in part dependent upon him for support, that said soldier left neither widow nor child under sixteen years of age surviving him, and that the mother of the soldier died May 27, 1850. His claim was rejected August 17, 1888, upon the ground that the proof adduced failed to establish the alleged dependence.

From said action of rejection, claimant appealed to the Department, January 26, 1889.

In a recent decision of the Department in the dependent-pension claim of David Rees (2 Pension Decisions, page 307), the several prerequisite conditions, which the law says should appear affirmatively from the evidence to entitle a claimant to a pension as a dependent father, are thus clearly stated:

It must be shown that, at the date of the death of the soldier, the father had no other adequate means of support than the contributions of his son, "or of any other person not legally bound to aid" in his support, and that he was unable to derive from his own actual or possible manual labor sufficient income to furnish him means of adequate support; and, furthermore, such pension, even if granted, can not be paid except during such period as the evidence may show it to be actually necessary as a means of adequate subsistence. (Section 4707, Revised Statutes of United States.)

The evidence in this claim shows clearly that, at the date of the soldier's death, in 1863, the appellant was a hale and hearty man, under sixty years of age, and with no one dependent upon him for support but one son, a boy about sixteen years of age; that he was physically well qualified for labor, and did labor, having constant employment during said year, and subsequent years, for which he received wages averaging $1 per day. The "gist" of this claim, as of all others of like character, is the question of dependence at the date of the son's death. If it is shown that the father was able to, and did, as a matter of fact, provide himself with an adequate support from the proceeds of his own labor, and that his means of subsistence were not rendered inadequate by the death of his son, then it is clear that he was not dependent upon him for support within the meaning of the law, and is not pensionable. It is immaterial whether the son actually made contributions to the father or not, unless it also appear that such contributions were actually necessary to the parent as a means of adequate subsistence.

It is manifest, without further argument, that this claim presents precisely the state of facts above indicated, and consequently the Department is clearly of the opinion that the appellant was not dependent upon the soldier at the date of his death, within the meaning and intent of the law, so as to entitle him to pension as a dependent father, and, consequently, your action rejecting his claim, upon said grounds, is affirmed.

LAY TESTIMONY—"NEW" DISABILITIES.

PAUL PFAU.

1. The Department reaffirms the ruling that "lay testimony, filed many years subsequent to the alleged incurrence of a disability, when unsupported by either the record or medical evidence is not deemed sufficient to prove incurrence" in the service and line of duty.
2. The failure to allege in the original declaration certain "new disabilities" as the basis of pension raises the strong legal presumption that they did not exist at the date of said original declaration, and that they are not due to the line of duty in the service.

Assistant Secretary Hawkins to the Commissioner of Pensions, January 30, 1889.

Herewith are returned the papers which accompanied your report of January 11, 1889, upon an appeal of Paul Pfau, late sergeant, Company H, One hundred and eighth Regiment Ohio Volunteers, from your action rejecting his claim for invalid pension, No. 171457.

It is shown by the records of the War Department that soldier was enrolled August 13, 1862, in Company D, One hundred and eighth Ohio Volunteers, for three years. On roll of company from enrollment to February *28, 1863, he is* reported "absent without leave," from Camp

Dennison, Ohio, since January 2, 1863. Return for January, 1863, reports him absent without leave since December 17, 1862. Prisoner of war records show him captured at Hartsville, Tenn., December, 1862. Paroled at Department of the Cumberland, December 10, 1862. No evidence of disability and no further information in said records, Claimant was subsequently transferred to Company H, same regiment, and mustered out with company July 22, 1865. No record of alleged injury nor of any disability while in said service.

January 12, 1872, claimant filed an original declaration for pension in which he alleged that, during a battle at Hartsville, Tenn., in December, 1862, he stumbled and fell, rupturing himself in the right groin. He stated that he was treated for alleged injury as a paroled prisoner of war from December 25, 1862, to about the first of February, 1863, at general hospital, Camp Dennison, Ohio.

This claim was originally rejected by your office April 5, 1882, on the ground that there was no record of treatment in service for alleged disability, and no satisfactory evidence that it originated in the service and line of duty.

January 27, 1888, claimant filed an additional declaration, alleging that, while in the service and line of duty at Bardstown, Ky., in September, 1862, he contracted chronic diarrhea and resulting piles, rheumatism, and heart disease. Thereupon, the claim was re-opened by your office for consideration of the alleged new disabilities, and after a careful consideration of the new and additional testimony the rejection of original claim for hernia was adhered to upon the ground before stated, and the claim for chronic diarrhea, piles, rheumatism, and heart disease—new disabilities—was rejected upon the ground that the evidence failed to connect said disabilities with his army service.

From this adverse action the appeal is taken.

In the absence of either record evidence or evidence of medical treatment while in the service, the question of origin of the alleged hernia seems to rest wholly upon the testimony of claimant's captain, lieutenant, comrades, and Dr. F. D. Leary, who state as follows:

F. E. Humbach, late captain, testifies in an affidavit on file that "claimant was ruptured in right groin at the battle of Hartsville, Tenn., in December, 1862, while running down hill and falling when trying to avoid being captured; that he was captured at the same time with claimant, and saw him come into the command on horseback, led by a rebel, being unable to walk in consequence of his injury." In reply to your office letter, February 5, 1881, this affiant states: "Allow me to say that Paul Pfau was in my company, but I never saw the claimant exhibit hernia to me. He was transferred from Company D, which I commanded, to Company H, and I never knew anything of him having hernia while under my command."

Charles Kulencamp, late lieutenant, testifies in an affidavit on file that claimant was ruptured as stated by the captain above. In reply to your office letter, this witness says he "knows nothing at all about the matter."

George Munsch and Conrad Bruck, comrades, testify in joint affidavit in corroboration of claimant's allegations as to origin of his rupture; but, in answer to letters from your office, they state that "they derived all their information in regard to the matter from the claimant."

George Krichenberger, comrade, testifies in an affidavit that he remembers that, "just after the men were captured at Hartsville, Tenn., in December, 1862, part of them were taken over the Cumberland River on boats and part on horseback; that claimant was on horseback, and, as soon as he got across, he dismounted and said he was hurt. He said he had tried to get away, but he had fallen over a stump and hurt himself. He then took down his pantaloons to examine, and affiant then saw a lump or swelling on the right side of his groin. He said that was the injury he had received. The lump was then about the size of a large marble." Concerning this affiant, the Adjutant-General U. S. Army reports that he was mustered in with claimant's company, but that a four months' muster, dated February 28, 1863, and March and April, 1863, shows him absent without leave from Cincinnati, Ohio, since December 16, 1862.

Dr. F. D. Leary testifies that he "treated claimant for hernia of the right groin from his discharge until January 12, 1872, but his reputation for the truth is ascertained to be bad."

It appears that Captain Humbach and Lieutenant Kulencamp have wholly retracted the statements contained in their affidavits by disclaiming any knowledge of the incurrence of the soldier's alleged hernia in the service; and that the statement contained in the affidavits of Comrades Munsch and Bruck were wholly based upon statements and complaints of claimant, thus leaving his declaration as to the origin of said hernia supported by the evidence of Comrade Krichenberger and Dr. F. D. Leary only, which does not satisfactorily prove that his said hernia originated in the service.

An examination of the testimony shows a failure on the part of the claimant to establish his alleged new disabilities—chronic diarrhea, piles, rheumatism, and heart disease. There is no record nor medical evidence of any disability in the service, and the testimony of J. G. Pfeifer and Jacob Heintz, given over twenty-three years subsequent to soldier's discharge, is not sufficient to establish incurrence.

The Department holds that lay testimony, filed many years subsequent to the alleged incurrence, when unsupported by either the record or medical evidence, is not deemed sufficient to prove incurrence. (See cases of Levi Reeves, vol. 2, P. D., p. 177, and Arad P. Brown, id., pp. 88, 89.)

The claimant in his original declaration, filed January 12, 1872, con-

fined his alleged disability exclusively to hernia in right groin. He makes no allegation whatever as to any other disability until he files his additional declaration, January 27, 1888, when he alleges "chronic diarrhea, piles, rheumatism, and heart disease." It would thus appear from claimant's own statement that his new disabilities—chronic diarrhea, piles, rheumatism, and heart disease—did not exist at the time of filing his original declaration. If claimant had the new disabilities which he now alleges at the date of filing his original declaration, he would naturally have alleged them, and his failure so to do raises the strong legal presumption that they did not exist. (See case of Laura, widow of John L. Wright, vol. 2, P. D., p. 253.)

From a careful consideration of all the evidence, I am of the opinion that it fails to prove the origin of claimant's alleged disabilities in the service and line of duty. Therefore, the action of your office in rejecting his claim, on the grounds stated in your report hereon, is affirmed.

PAYMASTER'S CLERK—ACT OF JANUARY 29, 1887.

JOHN H. CASSIN. (RECONSIDERATION.)

The act of January 29, 1887, provides pensions for surviving "officers" and "enlisted men" only of the Army in the war with Mexico, and, inasmuch as the clerk of a paymaster in the Army is not an "enlisted" man, he can not become a beneficiary of said act.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 11, 1889.

I have considered the motion for reconsideration filed by A. St. C. Denver, esq., attorney for claimant.

On August 31, 1847, John H. Cassin was duly appointed by Maj. George H. Ringgold, paymaster United States Army, as a paymaster's clerk under the authority of the act of July 5, 1838, and said appointment was approved on the same day. Said Cassin executed the oath of office required by law, entered upon the duties of said office, served nearly one year in Mexico, and resigned the latter part of 1848.

The only question at issue is, whether or not the claimant was a staff officer within the meaning and intent of the act of January 29, 1887, granting pensions to soldiers and sailors of the Mexican war. Beneficiaries named in said act, so far as applicable to this case are:

> The surviving officers and enlisted men * * * militia and volunteers of the military * * * service of the United States, who, being duly enlisted, actually served sixty days with the Army of the United States in Mexico, or on the coasts or frontier thereof, or en route thereto in the war with that nation. * * * That any such officer, enlisted man, * * * who is or may become sixty-two years of age * * * shall be entitled to the benefits of this act.

Section 2, article 2, of the Constitution provides that, "Congress may by law vest the appointment of such inferior officers as they may think

proper in the President alone, in the courts of law, or in the heads of departments."

The act of April 24, 1816 (3 Stats., 297), entitled "An act for organizing the general staff and making further provision for the Army of the United States," provides that "the pay department shall consist of one Paymaster-General of the Army * * *," and that, "in addition to regimental paymasters, there be appointed one paymaster to each battalion of the corps of artillery: *Provided*, That regimental and battalion paymasters may be taken either from the subalterns of the Army, or citizens, and appointed by the President of the United States: *Provided also*, That regimental and battalion paymasters shall receive the pay and emoluments of major, and shall each be allowed a capable non-commissioned officer as clerk, who, while so employed, shall receive double pay, and the actual expense of transportation while traveling under orders in the discharge of his duty."

It was decided by the Supreme Court of the United States in the case of Wetmore *vs.* United States (10 Peters, 647), that a paymaster in the Army of the United States, appointed under the act of Congress passed April 24, 1816, is entitled to the pay and emoluments of a major of infantry, and not to that of a major of cavalry.

Section 20 of the act of July 5, 1838 (5 Stats., 257), entitled "An act to increase the present military establishment of the United States, and for other purposes," provides, that, "whenever suitable non-commissioned officers, or privates, can not be procured from the line of the Army to serve as paymaster's clerks, paymasters be and hereby are authorized by and with the approbation of the Secretary of War to employ citizens to perform that duty at salaries not to exceed $500 per annum each."

Under this act it appears that Cassin was appointed by Major Ringgold, and his appointment was approved by the Secretary of War, September 1, 1847. It further appears that he took the oath of office required by the rules and regulations of the War Department.

Section 10 of the act of June 24, 1864, entitled "An act to increase the pay of soldiers in the United States Army, and for other purposes," provides: "that, from and after the passage of this act, the pay of clerks of paymasters in the Army of the United States shall be $1,200 per annum, without rations."

Section 1190, Revised Statutes, Title 14, provides that "paymasters and additional paymasters shall be allowed a capable non-commissioned officer, or private, as clerk. When suitable non-commissioned officers or privates can not be procured from the line of the Army they are authorized, by and with the approbation of the Secretary of War, to employ citizens as clerks."

Section 6 of the act of February 11, 1847, provides that "each non-commissioned officer, musician, or private of the regular Army, who served twelve months during the war with Mexico, should receive a

bounty land warrant for 160 acres of land, and those who served less than twelve months should receive land warrants for 40 acres."

Section 5 of the act of July 19, 1848, directed that "the officers, non-commissioned officers, musicians, and privates engaged in the military service of the United States in the war with Mexico, and who served out the term of their engagement or were honorably discharged, shall be entitled to receive three months' extra pay."

Under the rulings of the War Department, Cassin was paid the three months' extra pay authorized by the act of July 19, 1848; and, under the rulings of the Interior Department, he was granted a bounty land warrant for 160 acres of land.

The language of the act of January 29, 1887, is, "the surviving officers and enlisted men of the military service of the United States who, being duly enlisted," etc. It appears, therefore, that enlistment is a prerequisite to membership in the Army, and, under this act, to give title to pension. The attorney admits that Cassin was not an enlisted man. He was not an officer, because he had never been commissioned as such, and therefore he does not come within either of the classes specified herein as being entitled to pension. The language of the act under which he was appointed, as well as all subsequent enactments, forbids the supposition that he was employed in any other capacity than that of a citizen. It provides that, "whenever suitable non-commissioned officers or privates can not be procured from the line of the Army to serve in the capacity of paymaster's clerk," then, and in that event, "the Secretary of War is authorized to employ citizens to perform that duty," namely, the duty of paymaster's clerk, for which the statute specifically provides. And such "clerks" shall be retained in service only so long as they may be "required for the payment of volunteers."

It is manifest from a perusal of the above acts that the object and intent of Congress in authorizing the employment of "citizens" as "clerks" was to provide additional clerks who should pay the regular troops, "when suitable non-commissioned officers or privates can not be procured from the line of the Army" for this purpose.

The regulations of the Navy, on the other hand, provide in express terms that "clerks" and "captains' clerks" are officers of the Navy. Such also appears to have been their rank as recognized by the Navy Department General Orders, by the decisions of the Court of Claims, and by the United States circuit and Supreme Courts.

The Navy Department, by General Order No. 153, declares in terms that clerks to paymasters are officers of the Navy.

In accordance with this conclusion the motion herein is denied, and departmental decision of June 30, 1888, adhered to.

ORIGIN IN SERVICE.

MICHAEL CASSIDY.

(1) An allegation of claimant as to the origin of a disability in the service and line of duty must be sustained by more than merely presumptive evidence. A corroborating record, or direct testimony, based upon the personal knowledge of witnesses, must be presented to support said allegation.

(2) Where a disability is alleged to have been incurred in the first of two terms of service, the second enlistment operates as an estoppel to claim of pension for the alleged disability.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 1, 1889.

I have examined the papers which accompany the appeal of Michael Cassidy, late of Company H, Third Regiment, Rhode Island Cavalry, from the decision of your office adverse to his claim for invalid pension, No. 515,455. In his declaration, filed June 14, 1884, claimant alleges as the basis of his claim that he received an injury to his left leg, below the knee, by a fall of his horse while on a scout or raid near Donaldsonville, La., in the summer or fall of 1864.

The claim was rejected by your office after a careful examination, aided by a special investigation, upon the ground that the disability for which pension is claimed, viz, injury to left leg and resulting varicose veins, existed prior to the date of the alleged incurrence of the same, and, also, because the testimony on file and that obtained by a special examination of the claim does not show that the alleged disability was due to or caused by a fall from a horse.

From the above adverse decision the appeal is taken.

The record of claimant's service, as it appears in these papers, shows enlistment March 30, 1864; discharge, with company, November 29, 1865; absent, sick, cause not shown, on furlough from May 13, 1865, to July 13, 1865; otherwise reported present. Regimental Hospital register shows him "sick" in quarters September 5, 1864, with dysentery; returned to duty September 8, 1864. The record contains no mention of the injury which is alleged as the basis of claim.

Upon a careful reading of the evidence in the accompanying papers, embracing the results of a painstaking special investigation by a special examiner, detailed by your office for the purpose, the following conclusions have been drawn from the facts thereby disclosed:

1st. The evidence is conclusive that claimant, at the date of filing his declaration for pension, was suffering from ulcerations and varicose veins of his left leg, and that, for a period beginning shortly after his discharge from the service (November 29, 1865), he had been more or less afflicted with said ulcerations and veins. It appears, however, that in these papers, although comrades of claimant and officers of his company have testified, there is neither record evidence nor the testi-

mony of a single eye-witness to support claimant's own statement as to the place where, the time when, nor the manner in which the alleged disabilities were incurred. No fact has been established serving to directly connect said disabilities with any cause that either originated in or was due to the service and line of duty. The lack of such evidence is fatal to claimant's application for pension, based upon the present allegation.

2d. The total absence of proof to establish the origin of claimant's disabilities, as related by himself, leads to the conclusion that said disabilities were due, in fact, to some other cause than that cited in his declaration—a cause not indicated in the application upon which this appeal rests; and, inasmuch as the nature of said disabilities is such as not to be necessarily due to an injury received from the fall of a horse, or from any similar cause, it is reasonable to infer that the real cause of said disabilities is not stated in claimant's declaration. Said disabilities indicate the presence of a disease which did not spring from an injury inflicted upon claimant's left leg, and which was not due to the line of duty in the service.

3d. It appears from the accompanying papers that claimant was in *two* distinct terms of service, the first being for nine months, in Company E, Eleventh Regiment Rhode Island Volunteers, and the second in Company H, Third Regiment Rhode Island Cavalry. Two witnesses testify that they were comrades of claimant in the first, or nine months', service, and that they knew that, at that time, claimant had an ulceration on one of his legs, they having seen the same exposed whilst claimant was bathing and bandaging it in camp. This fact affords ground for the inference that claimant's leg was ulcerated prior to his second enlistment and, therefore, prior to the fall of 1864, when, as he alleges, he incurred the injury of leg from the fall of his horse during the scout or raid near Donaldsonville, La., and whilst he was in Company H, Third Regiment Rhode Island Cavalry. Claimant makes, however, no effort to establish the incurrence of his disabilities in the first, or nine months', service, just as he fails to prove the origin of the same in the second service. And yet claimant made a hospital record. The conclusion which we draw from these facts is that claimant's ulcerations of leg were the result of some blood disease, not due to the service, and that, during his connection with the Army, said ulcerations were sufficiently healed to allow him to do the temporary military service which he rendered; but that, subsequent to his discharge, the old cause of the ulcerations became the source of the permanent affliction which he may be now enduring.

The lack of all evidence to prove the origin of the alleged disabilities in the line of duty in the service renders it necessary to affirm the action of your office in rejecting the claim.

PATHOLOGICAL SEQUENCE—MEDICAL OPINION.

JACOB COLLINS (GUARDIAN).

A soldier, having a hospital record showing the existence of a given disease in the service, died, subsequent to his discharge, with a disease apparently different from that described in the aforesaid hospital record; and the medical referee having expressed the opinion that the latter disease was not a pathological sequence of the former, the Department holds that said medical opinion is conclusive against the claim of pension based upon the former cause as alleged in claimant's declaration; and the appeal from the Commissioner is therefore denied.

Assistant Secretary Haukins to the Commissioner of Pensions, February 6, 1889.

Herewith are returned the papers which accompanied your report of January 30, 1889, upon the appeal of Jacob Collins, guardian of the minor children of Julius F. Mabe (deceased), late private, Third Battery, Iowa Light Artillery, from your action rejecting his claim for pension on behalf of said minors.

It is shown by the records of the War Department that the soldier was enrolled September 21, 1861, and, from muster-in to February 29, 1864, he is reported "present" for duty. Re-enlisted December 22, 1863, and reported "present" for duty until December 31, 1864, when he is reported "sick" in hospital at Little Rock, Ark. Entered general hospital at Little Rock December 20, 1864, with "intermittent fever"—diagnosis also given as "febricula"—and was returned to duty January 3, 1865. He was mustered out with company October 23, 1865. No evidence of any sickness or disability in service other than that above mentioned.

The soldier filed an original declaration for invalid pension, November 12, 1880, alleging therein, as the basis of his claim, that, while in service and line of duty at Little Rock, Ark., in January, 1864, he contracted a severe cold which settled in his throat and lungs and caused inflammation of his eyes, for which he was treated by one Dr. Smith, an army surgeon, for about one week; then by Dr. Durant, of an Indiana regiment, for about two weeks; then sent to hospital at Little Rock, where he alleges that he was treated for lungs, throat, and eyes by Dr. McDonald, the surgeon in charge.

Pending the adjudication of the above claim, the soldier died, May 24, 1882, of "stricture of œsophagus," as shown by medical testimony on file, and accepted by the medical referee as the correct cause of death. Thereupon Harriet S. Mabe filed a declaration for pension, as the widow of said soldier, July 22, 1882, alleging therein the death of her husband, on the date aforesaid, from disease of lungs and throat contracted in his military service, and that he left surviving him the following children under sixteen years of age at the date of his death: Nettie, born June 10, 1868; Nora, born March 2, 1870; Mary B., born

December 27, 1871; Alice L., born February 7, 1876; Annie Olive, born October 7, 1880.

Pending the adjudication of her said claim the widow died, on or about October 1, 1887.

The appellant, having been duly appointed and qualified as guardian of the above-named minor children, thereupon filed in their behalf a declaration for pension, May 9, 1888, alleging that the soldier died of disease contracted in the military service of the United States.

The aforesaid claims were all considered and adjudicated together, and a special examination was ordered to determine their merits and the value of the testimony previously filed.

After careful consideration of the testimony procured by said special investigation, the aforesaid claims were rejected November 19, 1888—the soldier's invalid claim upon the ground that the proof on file fails to establish origin in the service and line of duty of the alleged diseases of throat, lungs, and eyes; the widow's claim upon the ground that the evidence in the case is insufficient to show that the soldier's fatal disease was due to any cause arising in service and line of duty; and the present claim of the guardian, on behalf of the minor children, was rejected for the same reason.

From said action of rejection, this appeal was made to the Department January 2, 1889, contending that the evidence on file is sufficient to establish said claims.

The record of soldier's military service shows him to have been sick in hospital at Little Rock, Ark., with "intermittent fever," about the time when it appears, from the evidence in his invalid claim, were incurred the diseases of lungs and throat and affection of eyes, upon which said claim is based. It is true that, in his original declaration, the soldier alleged that said disabilities were incurred in January, 1864; but it is evident from his subsequent statements and from the other testimony in the claim that this must have been a clerical error, and that he meant 1865. The presumptions arising from a hospital record of this character, by which the soldier is shown to have been admitted to hospital and treated for different diseases from those alleged as the basis for pension, about the same time that the incurrence of the alleged pensionable causes is asserted, and the entire failure of said record to mention or to furnish any evidence of the existence or as to the treatment of said disabilities on account of which pension is claimed, are strongly adverse, and are held by this Department to be entitled to such weight that they can be overcome by direct, positive, and satisfactory evidence only. (See case of Ellis Luther, 1 Pension Decisions, 387, and decisions upon this point there cited.)

The evidence on file in the invalid claim of the soldier, as to origin in the service and line of duty of the alleged diseases of lungs and

throat and affection of eyes, upon which the claim is based, utterly fails to comply with the requirements of the foregoing rule, and is wholly insufficient to overcome the presumptions arising from said hospital record. In fact, the testimony fails to establish the existence, either in service or at discharge, of the alleged diseases of lungs and throat; and the weight of the testimony as to the alleged affection of eyes of soldier in the service indicates that said disability, if it existed at all, could not be ascribed to his military service, but was the result of a venereal disease.

The question presented for determination in the claim of the widow, and in the present claim of the guardian, being a purely medical one, involving the pathological relation of the death-cause of the soldier to his military service, the papers and the evidence in the claims were properly referred to the medical referee for his consideration and opinion as to whether or not, granting that the alleged diseases of throat and lungs had been legally established, the accepted death-cause of the soldier, stricture of the œsophagus, could be pathologically accepted as the result of said diseases, or of either of them. The medical referee, after careful review and due consideration of all the evidence on file, replied, in an opinion of January 21, 1889, that it could not, nor could it be otherwise ascribed to his military service.

In accordance with the general rule of the Department in passing upon medical questions, the above opinion of the medical referee will be held to be conclusive as to the merits of the two latter claims. (See case of Faulkner, Joseph F., 1 Pension Decisions, 292, and decisions therein cited.)

For the above reasons, your action rejecting all of the above mentioned claims is affirmed.

COLORED MINORS' CLAIM.

CHILDREN OF PETER WILLIAMS.

The Department holds that the provisions of section 4705, Revised Statutes, relating to the marriage of colored and Indian soldiers and sailors, must be strictly construed and be squarely and fully complied with, in order that those who seek the benefits thereby conferred may be entitled to them.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 25, 1889.

Herewith are returned the papers which accompanied your report of February 16, 1889, upon the appeal of the children of Peter Williams (deceased), late private, Company B, Sixty-seventh United States Colored Troops, from your action rejecting their claim for pension as minor children of said deceased soldier.

The above-named appellants filed their original declaration for pension, November 13, 1884, alleging that their father died while in the U.

S. Army; that he had married their mother, Vine White, during 1851; that appellants were born August 1, 1852, January 15, 1854, and June 27, 1857, and that their mother remarried during 1860.

War Department records show that soldier enlisted January 11, 1864, and died while in the service, of inflammation of liver, February 24, 1864.

The claim was rejected October 24, 1888, upon the ground that the appellants were "not the lawful children of soldier under section 4705, Revised Statutes. Soldier was not living with the mother of appellants at enlistment, but with another woman to whom he had been married by the slave custom."

From said action of rejection the present appeal was taken to this Department, the appellants contending that, as their parents were separated when slaves by their master, without any fault of their own, any subsequent marriage of soldier should not deprive them of their just rights as the children of the soldier.

There appears to be no dispute as to the facts in this case, and the only question to be decided, under this appeal, is whether or not the relation which existed between the parents of these appellants was such as would entitle them to pension as the lawful children of the deceased soldier, under the provisions of section 4705 of the Revised Statutes of the United States relating to the marriage of colored and Indian soldiers and sailors who enlisted prior to March 3, 1873.

Said section establishes an exception to the general rule in favor of the classes of persons therein designated with regard to what shall constitute a marriage so as to entitle the widow and minor children of such colored or Indian soldiers and sailors to pension; and, like all similar statutory provisions, it must be construed strictly, and those seeking the benefits conferred by said section must bring themselves squarely and fully within its provisions before becoming entitled thereto. Said section 4705 is as follows:

SEC. 4705. The widows of colored and Indian soldiers and sailors who have died, or shall hereafter die by reason of wounds or injuries received, or casualty received, or disease contracted in the military or naval service of the United States and in the line of duty, shall be entitled to receive the pensions provided by law without other evidence of marriage than satisfactory proof that the parties were joined in marriage by some ceremony deemed by them obligatory, or habitually recognized each other as man and wife, and were so recognized by their neighbors, and lived together as such up to the date of enlistment, when such soldier or sailor died in the service, or if otherwise, to date of death; and the children born of any marriage so proved shall be deemed and held to be lawful children of such soldier or sailor; but this section shall not be applicable to any claims on account of persons who enlist after the third day of March, one thousand eight hundred and seventy-three.

The undisputed facts in this case are that the aforesaid relation between the parents of these appellants did not continue, and they did not live together as man and wife up to the date of the soldier's enlistment, as is absolutely required by the above-quoted section in order that the *relation* existing between them could be considered such a marriage

as therein defined and as would entitle the minor children of such a union to pension. On the contrary, it appears that the parents of these appellants had ceased to live together or to recognize each other as man and wife for some years prior to the soldier's enlistment, and that at that date they had both remarried, and the father was living with another woman as his wife, and the mother with another man as her husband.

It is immaterial whether or not the original separation between the parents was voluntary or involuntary, as alleged and insisted upon by the appellants; the parents most unquestionably did not recognize each other as man and wife, and live or cohabit together as such up to the date of soldier's enlistment, and, having failed to do so from any cause, the conditions of the statute have not been complied with, and their children can not be held entitled to pension under said section.

Your action of rejection is accordingly affirmed.

LINE OF DUTY.

HENRY A. HELMER.

1. The cause of disability, to entitle claimant to pension, must in some manner pertain to and have a natural and logical connection with the military service and line of duty.
2. Riding a horse for personal pleasure against the protest of his captain, who warned claimant of his danger in attempting to ride a fractious horse with whose habits claimant was already well acquainted, can not be regarded as in any manner connected with military duty.

Assistant Secretary Hawkins to the Commissioner of Pensions, March 1, 1889.

I have considered the appeal of Henry A. Helmer, Company C, Eighth Indiana Volunteers (No. 463067), of February 14, 1889, from your office decision of March 2, 1885, rejecting his claim for invalid pension upon the ground that "the alleged injury was not incurred in line of duty."

Soldier enlisted September 5, 1861, and was discharged July 31, 1862, on a surgeon's certificate of disability which certifies that he was "incapable of performing the duties of a soldier because of a fracture of the fibula and a dislocation of the ankle-joint of the left leg, soon after the battle of Pea Ridge, while in the line of duty. The bone has united very well, but the dislocation of the ankle is attended with some deformity, and will not for a long time, if ever, have sufficient strength to march. His disability is one-third."

The case was specially examined, and the claimant testified before special examiner, November 12, 1884, in relation to the alleged incurrence, as follows:

On or about the second day after the battle of Pea Ridge, I was taking care of my captain's horse. I *asked him* for the loan of the horse to go over the battle-field just

to look at it. Second Lieut. John Kahoe also went with me on horseback. When I asked the captain for the horse he said, "Henry, I rather you would not take him. He may throw you and kill you. You know he has thrown you once or twice." He throwed me once, at Osage River, over his head, but did me no injury. As we were riding along my horse got frightened, I think at a dead horse, and commenced back-jumping, and the first thing I knew I was thrown against a tree. When I went to get up, I found I was badly hurt; my ankle just flopped over. The lieutenant went back to camp for help * * * They carried me to my tent, and went and got one of the surgeons of the regiment, who set my ankle which was broke, the outside bone of the left ankle, and put the splints on it.

The evidence unquestionably shows that claimant has ever since suffered from this disability, and in a pensionable degree. The question arises whether the injury was incurred in the line of duty. It is true the certificate states that such was the case, but the statement of claimant shows the contrary. The cause of disability to entitle claimant to pension must in some manner pertain to and have a natural and logical connection with the military service and line of duty in said service. (See the case of William Ammerman, 1 Pension Decisions, p. 5; Wm. Jones, *ibid.*, p. 87; Carroll Wagoner, *ibid.*, p. 338; Jesse M. Stillwell, 2 Pension Decisions, p. 83; Alexander Gillespie, *ibid.*, 16.)

While the Department holds, as a general proposition, that the certificate of disability for discharge must be deemed conclusive evidence of the facts therein alleged, yet exceptions to this rule are cases of fraud or mistake apparent upon the face of the certificate itself, or clearly established by conclusive evidence. (See case of Adam Cutts, 2 Pension Decisions, p. 26; Wm. H. H. Stone, 1 Pension Decisions, p. 182; Anson Howe, *ibid.*, 198; Thos. McCreary, *ibid.*, 257; Albert T. Chapin, 2 Pension Decisions, p. 254, and cases therein cited.)

The exception to the general rule in relation to the weight to be given to certificates of disability was recognized by the Department in the case of Benjamin Tutt (1 Pension Decisions, p. 412), and the statement contained in the certificate of disability for discharge was disregarded, the proof in that case satisfactorily showing that the language used in the certificate was a mistake; that the surgeon had inadvertently used the word "previous" instead of the word "subsequent."

In the case under consideration it is clearly apparent that the statement in the certificate that the injury complained of was received by claimant "while in line of his duty" was a mistaken conclusion on the part of the certifying surgeon. Riding a horse for personal pleasure, against the protest of his captain, who warned him of his danger in attempting to ride a fractious horse with whose habits claimant was already well acquainted, can not be regarded as in any manner connected with claimant's military duty.

The rejection of the claim by your office for the reasons stated was not error, and your decision is therefore affirmed.

The papers in the case, accompanying your letter of transmittal of February 26, 1889, are herewith returned.

PENSIONABLE DEPENDENCE.

MARGARET LONGSHAW, MOTHER OF WILLIAM LONGSHAW.

The Department construes and applies the provisions of section 4707, Revised Statutes, relating to pensionable dependence and to "adequate support."

Assistant Secretary Hawkins to the Commissioner of Pensions, March 1, 1889.

Herewith are returned the papers which accompanied your report of February 15, 1889, upon the appeal of Margaret Longshaw, mother of William Longshaw (deceased), late assistant surgeon United States Navy, from your action rejecting her claim for pension as dependent mother of said deceased officer.

The appellant filed her declaration for pension February 20, 1879, alleging as the basis of her claim that she was in part dependent upon her son, the above-named deceased officer, at the time of his death in the service, January 15, 1865, and that her husband died January 3, 1877.

The records of the Navy Department show that the said officer was commissioned November 20, 1862, and was killed in action at the storming of Fort Fisher, January 15, 1865, after having served most gallantly.

Pending its final adjudication in your Bureau, this claim was specially examined to ascertain the facts relative to the alleged dependence of appellant upon said officer at the date of his death. After due consideration of the testimony procured by said special examination, the claim was personally considered by you and finally rejected August 6, 1887, upon the ground that the evidence fails to show that appellant was dependent for support upon said officer at the date of his death.

Subsequently, additional testimony was filed by appellant with the view of having the claim re-opened, which testimony also was carefully considered by you personally, and on July 7, 1888, you informed the appellant of the result, saying:

> The said evidence does not go to the cause of rejection but relates to certain pecuniary losses incurred in 1875 and subsequently, many years after the death of the officer who was killed in action in January, 1865. I am therefore constrained to adhere to the rejection upon the ground that claimant was receiving a comfortable and adequate support from her husband at the date of her son's death, as shown by the assessor's records and other evidence in the case, and consequently claimant is not entitled under the general law.

From said action of rejection, the present appeal was taken to this Department February 9, 1889.

The only question that is presented for consideration by this appeal relates to the dependence of the appellant, in whole or in part, upon her deceased son for support at the date of his death, January 5, 1865, under section 4707 of the Revised Statutes.

It appears to be fully established by the evidence on file that, at the date of the death of said son, the appellant and her husband (the father of the deceased officer) were living together in moderately comfortable circumstances, with no one dependent upon them for support, the only other member of the family being a younger brother of the deceased officer, who was grown, absent from home, and self-supporting at that time; that the husband of appellant was conducting a small retail drug business of his own; that he was out of debt, owned a valuable and comfortable dwelling-house in which he resided, and some real estate besides, the said property being assessed for that year (presumably a low valuation) at considerably over $5,000. While it does not appear exactly what income the father of the officer derived from his drug store and from other property at the date of his son's death, it clearly appears that it was not only sufficient to afford the appellant and himself a comfortable support, but to enable him to largely increase his stock in trade and enlarge his business, as is unquestionably established by the transcripts from the official records of the assessment lists of his taxable property for the years immediately succeeding the death of the soldier down to the date of his death, in 1877.

While it is unquestionable that the deceased officer made contributions from his pay and allowances to his parents during his service, it is equally as certain that at no time during his service were such contributions necessary as a means of adequate subsistence to the appellant; and, hence, said contributions become, and are, an entirely immaterial circumstance in discussing the merits of this claim, since, if said contributions were not necessary for that purpose, they could by no means constitute a condition of dependence by the appellant upon her son in the sense contemplated by the statute.

There can be no doubt from the evidence, and no such position is urged by the appellant, that her husband afforded her, during his lifetime, as comfortable a support as his means permitted, and that, as has been shown above, said means were fully adequate for that purpose.

It is urged, however, by the appellant, that the means of support contemplated by the statute must be adequate and suitable to her estate and condition in life, in order to render her independent of the contributions of her son; that what would be considered "adequate means of support" for one person would not be so considered for another, in a different station and condition of life. While this is unquestionably true, to a certain extent, it is also true that the means of support contemplated by the statute which would preclude a parent from pension as dependent upon a son is an ordinary comfortable support, such as would provide the parent with the usual necessaries and ordinary comforts of life; and said statute does not mean that if the parent by the death and loss of the contributions of the son is deprived of certain of the luxuries and conveniences of life by which her condition is rendered more comfortable than it otherwise would be, such a state of affairs *would constitute* a condition of dependence upon him for support within

the intent of the law, such as would entitle her to pension. Such a position is clearly refuted, not only by the language of the statute itself, which provides that the pension therein granted "shall not be paid for any period during which it shall not be necessary as a means of adequate subsistence," but also by the fact that the pension therein granted to dependent mothers and fathers is of so small an amount and given to all alike, irrespective of their station and condition in life. That the means of livelihood of this appellant and of her husband was in no way diminished, or even curtailed, by the death of said officer is fully demonstrated by the official record of the taxable property assessed against the father, from the year 1865 (the year of soldier's death) to the year of his death, 1877, inclusive, which shows a steady increase in the valuation of his stock in trade in his business and his real estate, until upon his death he was enabled to leave the appellant a life estate in property appraised at $9,675.

The contention of the appellant that her deceased son had contributed by his means and labor a large part of the property possessed by his parents at the date of his death can have no possible bearing upon the question at issue here. If by his filial devotion and generosity he had succeeded in placing his parents in a position of comfortable independence prior to his death, the property he had assisted them to accumulate was no less theirs, and the very fact that he had accomplished this is proof conclusive that appellant could not have been dependent upon him at the date of his death, or looked to future contributions from him as a necessary means of adequate subsistence.

It is clear from the evidence that this appellant has fallen into the common error that, because a large portion of the property left her upon the death of her husband has become unremunerative, been lost by bad investments, and her circumstances in life greatly reduced since the death of her son and her husband, her present dependent condition would entitle her to pension under the law, and the great mass of the evidence which she has produced in support of her claim is in furtherance of this view and goes to her present condition in life. This, under the law, can have no bearing upon her right to pension in the first instance under section 4707, Revised Statutes. By the express provisions of said section it would be only her condition of dependence upon said officer at the date of his death that would give her title to pension thereunder, and her subsequent financial condition could only become material as affecting the continuance of the payment of such pension if already granted.

It is impossible to withhold sympathy from this aged lady, the mother of a gallant and heroic officer who gave his life for his country amid the shock of battle, in her present reduced circumstances; but it must be clearly manifest, from the foregoing, that it is impossible for your Bureau or for the Department to afford her the relief she seeks, under the provisions of the law as they now exist, and, consequently, your action of *rejection is affirmed.*

OPINION OF MEDICAL REFEREE.

JAMES R. OWEN.

The opinion of the medical referee, based upon the medical evidence in a claim for pension, is accepted by the Department as generally conclusive respecting the medical questions involved.

Assistant Secretary Hawkins to the Commissioner of Pensions, February 25, 1889.

Herewith are returned the papers which accompanied your report of February 15, 1889, upon the appeal of James R. Owen, late private, Company A, One hundred and forty-eighth Illinois Volunteer Infantry, from your action rejecting his claim for invalid pension, No. 151322.

Claimant's declaration was filed in January, 1870, in which hernia and varicocele were alleged as causes for pension, incurred about June 1, 1865, at Tullahoma, Tenn. He filed, March 15, 1886, and alleged in a second declaration, that he incurred sprained ankle and received other injuries, resulting in hernia and varicocele, about March, 1865, between Louisville and Nashville, Tenn.

The record of service shows that appellant enlisted January 31, 1865, for one year, and was discharged with his company September 5, 1865. The records of the office of the Adjutant-General do not show any disability from hernia and varicocele June 1, 1865. The hospital records show soldier was admitted to general hospital No. 3, Nashville, Tenn., with sprained ankle, February 26, 1865; transferred March 25, 1865; entered No. 11, small-pox hospital, same date, with varioloid; transferred April 15, 1865; entered general hospital No. 3, Nashville, Tenn., April 16, 1865; returned to duty April 24, 1865; entered Cumberland General Hospital, Nashville, August 15, 1865, from regimental hospital, with general debility, and was returned to duty August 30, 1865. The regimental hospital records are not on file.

The claim was rejected by your office February 14, 1888, on the opinion of the legal reviewer, stating grounds of rejection, viz: "No record or other competent testimony as to origin of hernia and varicocele, and claimant with the aid of a special examiner fails to establish the claim, and, also, to show any disability from sprained ankle at date of discharge and continuously since."

From this action appeal is taken, the contention being, first, the conclusion of fact shown by the evidence as to hernia in service; second, rejection was contrary to law; and third, error on the part of the Bureau in not causing special examination to extend to alleged injury of ankle.

Appellant alleges in his second declaration, filed March 15, 1886, that he incurred sprained ankle and received other injuries resulting in hernia and varicocele about March, 1865, between Louisville and Nashville, Tenn.

In the absence of record evidence, or testimony of medical treatment while in the service, the question of origin of the alleged hernia and varicocele seems to rest solely upon the testimony of appellant's captain and two comrades, who state as follows, viz: John G. Brady, late captain, testifies in an affidavit filed February 26, 1870, that "appellant became sick at Tullahoma, Tenn., June 1, 1865; that affiant never knew personally what disease affected him, but is informed and believes said disability to have been inguinal hernia and varicocele, caused, in affiant's opinion, by exposure in line of duty."

William W. Owen, comrade and cousin of appellant, testifies in an affidavit filed October 30, 1882, that "he was a member of same company and regiment as claimant, and was his bunkmate, and that at Tullahoma, Tenn., in the spring of 1865, he *saw* the rupture of the said James R. Owen. It was located on the left side of his privates."

This witness testified before a special examiner, March 23, 1887:

* * * That he went swimming with claimant before he enlisted and never noticed any swelling of the testicles or lump in his groin. At the time we were mustered in we were examined at Quincy, Ill. We were stripped naked in a room and examined thoroughly. I was left at Quincy with typhoid fever, and the regiment went on down, and I got to it at Tullahoma, Tenn., in the spring of 1865; claimant was not there. I learned of my comrades that he was left at Nashville, hurt. * * * We had been at Tullahoma a month or six weeks before claimant joined us. I learned from him that he was not feeling well; he complained of his ankle and the lower part of his bowels. He said he had a breach of the bowels; he did not show his person to me. I bunked with him after that, but I never saw his privates until after we came home. It was a year probably after we got home that I saw his privates; one was smaller and hung down low. * * *

Jacob Reynolds, comrade, testified in an affidavit filed March 29, 1887, that "he is personally acquainted with appellant, and that some time during the month of March, 1865, while on board of the cars between Louisville, Ky., and Nashville, Tenn., the train stopped to take on wood and, in getting off the train, he slipped and fell and sprained his left ankle. He was so badly injured that he was left at the hospital at Nashville, Tenn. He was unable to walk a step when he was sent or left at the hospital. Affiant was a member of the same company and was with the company and knew the facts of his own knowledge, and from that time on the said Owen was unable to do but very little duty."

This affiant testified before a special examiner, May 18, 1887, substantially as follows:

I knew this man James R. Owen well; we enlisted about the same time in same company. About his getting any disability in service, all I know is this: Going from Louisville to Nashville, Tenn., he hurt his ankle, that is, sprained it a little. Some of the boys jumped off the train, and what for I don't know; but they got on again, and Owen had a sprained ankle for a week or so, but it did not last long, and he was sent to hospital at Nashville, and there he took varioloid and was there about a couple of months, more or less. I do not know anything about how he sprained his ankle, only from what he said. I only know that it was sprained in the service. I do not know whether he got it in the line of duty or not. * * * Now

I want to tell you something about this. When I was in Clarinda, Iowa, last winter, Owen came to me and asked me to sign a paper about his ankle being sprained, etc. I told him I did not want to, as I could not say how he hurt his ankle, or that it kept him from duty a day; but some one who was standing by, said "Oh, sign it; it won't do any harm, and they (the office) will correspond with you." I signed the affidavit, but I do not want it to go as mine at all. I want this you write, that I am now telling you, to go as mine. Now, Owen was a poor, weak sort of man, anyway, and hardly able to do any duty; he did have diarrhea very badly. This is all I can tell you.

Q. Did he receive any other disability in service that you know of; if so, state fully what it was?—A. No, sir.

Q. Do you know of his being ruptured or anything of that kind in service?—A. No, sir; but I know he was ruptured when he enlisted.

Q. Please explain fully.—A. Why, at enlistment, we were all examined at Quincy, Ill., stripped stark naked. My brother-in-law, William Owen, and I talked it over, and was afraid claimant would not be taken then. The doctor examined him and he was ruptured in the scrotum. One testicle hung down nearly the length of my finger further than the other. I saw it plainly. I had heard before from his folks that claimant was ruptured. Sometime ago, when I lived in Illinois, I got a paper from claimant to sign about his getting ruptured in the service. I sent it back and would not sign it, because I was satisfied he was ruptured before he enlisted. Of course I did not want to do him an injury; at the same time I did not want to lend myself to anything that looked like fraud. * * * I am his cousin by marriage, have nothing in the world against him, no ill feeling at all, but would do well by him; but can not lie for him. * * *

The testimony to establish the alleged hernia and varicocele, in the face of the adverse presumptions referred to, should be clear and convincing.

The foregoing testimony of Captain Brady and of Comrade Owen, tending to show that appellant suffered from hernia and varicocele in the service, is not from any personal knowledge of the facts, but is wholly based upon statements of the appellant and others, is merely hearsay, and entirely insufficient to support the allegations of appellant as to the incurrence of his alleged hernia and varicocele.

The testimony of affiant, Reynolds, wholly fails to prove the incurrence of appellant's alleged hernia and varicocele in the service. On the contrary, it tends to show that appellant was suffering from rupture and varicocele at the time he was examined for the service and before entering the service.

From a careful consideration of all the evidence filed in this case, I am of the opinion that it is insufficient to prove that appellant incurred his alleged hernia and varicocele while in the service.

It appears from the hospital records that appellant was admitted to General Hospital, No. 3, Nashville, Tenn., with sprained ankle, February 26, 1865. And it further appears that he was medically examined October 2, 1880, June 28, 1882, by a single surgeon, and May 5, 1886, by a board of surgeons. The medical referee of your office, with the reports of these medical examinations before him, on the 6th day of August, 1886, gave his opinion that "the claimant has not been disabled in a

pensionable degree on account of alleged injury to ankle since date of filing claim."

The opinion of the medical referee, based on the result of medical examinations, will be accepted as conclusive. (Case of John Douglass, Vol. 1, Pension Decisions, page 52.)

No pensionable disability from injury to ankle exists prior to date of filing declaration, and it was wholly unnecessary to extend the special examination to this feature of the claim. The cases cited by appellant's attorney in support of this appeal have no bearing whatever upon the question involved, and can not be urged as authority in favor of the grant of a pension to appellant.

For the reasons hereinbefore given the action of your office rejecting the claim on the grounds stated in your report is affirmed.

HONORABLE DISCHARGE—MEXICAN WAR.

WILLIAM B. JOHNS.

1. The Department enforces the decision of the Supreme Court of the United States in the case of James H. North (U.S. R., 112, p. 510), Chief-Justice Waite delivering the opinion, to the effect that "Those of the regular Army and Navy, who were engaged in the military service of the United States in the war with Mexico, may be said to have served out their term of engagement, or to have been honorably discharged within the meaning of those terms as used in the act of 1848, when the war was over, or when they were ordered or mustered out of the service. Being in the Army or Navy, their engagement was to serve wherever they were ordered for duty. Their engagement to serve in the war with Mexico ended when they were taken away from that service by proper authority."
2. The doctrine thus announced by the Supreme Court is applicable in the interpretation of the act of January 29, 1887, providing for service pensions for the surviving soldiers and sailors of the war with Mexico.

Attorney-General Garland to the President of the United States.

DEPARTMENT OF JUSTICE,
Washington, D. C., February 27, 1889.

SIR: I have very carefully examined the question you submitted to me the other day upon the papers relating to the service-pension claim No. 8844 of William B. Johns, captain, Company C, Third United States Infantry, in the war with Mexico. Among these papers is a copy of an opinion by the Hon. D. L. Hawkins, Assistant Secretary of the Interior, upon this same claim, which I have considered very maturely in connection with the statute; and I am perfectly satisfied with that opinion as containing the law of the case. I can not add anything to its reasoning, and I adopt it as my opinion, in answer to your inquiry.

I herewith return the papers to you.

Very respectfully,

A. H. GARLAND,
Attorney-General.

The PRESIDENT.

Assistant Secretary Hawkins to the Commissioner of Pensions, December 13, 1887.

The papers accompanying the service-pension claim, No. 8844, of William B. Johns, captain, Company C, Third United States Infantry, in the war with Mexico, are herewith returned to you.

The basis of this claim is service in the war with Mexico as captain of Company C, Third Regiment of Infantry, commanded by Col. E. B. Alexander, claimant asking for pension under the act of January 29, 1887.

Claimant alleges in his declaration, filed by his attorney, F. L. Browne, April 11, 1887, that he is aged over sixty-two years; that he participated in the following engagements during the war with Mexico, viz: Palo Alto, Resaca, Vera Cruz, Cerro Gordo, Contreras, Cherubusco, Garita de San Antonio, Chapultepec, Garita de Belen (citadel), and City of Mexico. On discharge from said service he has resided as follows: At 1330 Thirtieth street, West Washington, D. C., nearly continuously, since the beginning of the war of the rebellion; and he took no part in said war. Claimant declares that he received a brevet for gallant and meritorious conduct in the battle of Cerro Gordo, April 18, 1847. He declares, also, that he has heretofore made application for and received a bounty land-warrant for services in the Florida war, and that he has, likewise, received three months' extra pay as captain of infantry, for service in the war with Mexico.

The aforesaid bounty land-warrant, as appears on the face of the accompanying brief is 2305–150–50.

Claimant alleges that he *resigned* his commission on or about April 11, 1861, and the records of the War Department show that he was *dropped* from the rolls of the Army April 11, 1861, by reason of the following order:

General Orders, No. 10. } WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE, *Washington, D. C., April* 11, 1861.

Capt. Wm. B. Johns, Third Infantry, having declined the command of his company when ordered on a particular service, the President directs that he cease to be an officer of the Army from this date.

* * * * * * *

By order.

L. THOMAS,
Adjutant-General.

In view and by reason of the foregoing order, the claim was rejected by your office, July 30, 1887, on the ground that "claimant was summarily dismissed the service of the United States by the President, April 11, 1861," and upon the additional reason that "an honorable discharge from said organization is prerequisite, before appellant is entitled to any of the benefits of [the aforesaid] act" of January 29, 1887.

From this action the present appeal is taken, claimant contending that "the ruling of the Department in the case of Thomas Buckley,

decided June 29, 1887, and the ruling, 133, of the Commissioner of Pensions in the case of Harriet, widow of George W. Kimble, Company I, Fourth Maine," are applicable to his claim; and that the dropping of his name from the rolls of the Army April 11, 1861, is "no legal bar to his application for pension, under act of January 29, 1887, on account of service in the war with Mexico."

OPINION.

This appeal raises the question whether or not the order, signed by the Adjutant-General of the Army, April 11, 1861, to the effect that, claimant "having declined the command of his company when ordered on a particular service, the President directs that he cease to be an officer of the Army from this date," shall be construed as a bar to pension under the act of January 29, 1887, "granting pensions to the soldiers and sailors of the Mexican war." The claim was rejected by the Commissioner of Pensions, upon the ground that the aforesaid order was equivalent to a dishonorable discharge from the service, and that "an honorable discharge from said organization is prerequisite, before appellant is entitled to any of the benefits of said act."

A careful consideration of the facts as they appear in the accompanying papers, and of the law as it seems to be applicable to the claim, leads me to overrule the aforesaid rejection and to sustain the appeal, for the reasons which follow:

(1) The act of January 29, 1887, under which claimant filed his application, relates exclusively to "the soldiers and sailors of the Mexican war," and provides for pensions that may be granted by reason of enlistment and service in that war only. The act is no part of the general pension laws. Being specific in its terms, relating to a particular service, and expressly limited in its operation, it can not be construed to apply to any other service than that which it designates, nor to any other persons than those for whose benefit it distinctly provides. The "Mexican war" was thus recognized as "a particular service" by the act under consideration; and claimant's application for pension is based exclusively upon service in that war. In view of this fact, it is obvious that the order, signed by the Adjutant-General, April 11, 1861—thirteen years subsequent to the termination of the Mexican war—can not affect, inasmuch as it is not connected with nor related to, the service of claimant in that war; and, furthermore, it can not be set up as a bar to pension under the limitations of the aforesaid act. The above-quoted order was in no sense a "discharge" from the service in the Mexican war.

(2) The order issued by the Adjutant-General, April 11, 1861, even if construed as a dishonorable discharge, in spite of the evident facts which are disclosed in the accompanying papers, must be regarded as only a penalty for claimant's declination to take "command of his company when ordered on a particular service." The "particular service" is not

otherwise described in the order, but the legal presumption is that it was *a service upon which claimant had never entered*, and therefore a service not only subsequent to, but distinct from, the Mexican war, to which alone the act of January 29, 1887, is applicable. But, to extend and to attach a penalty that was inflicted April 11, 1861, for an act of alleged disobedience, done in connection with "a particular service" of that date, to claimant's faithful conduct in a wholly different service—a service which had ended thirteen years before—would be to place a forced and irrational interpretation upon the statute. It is evident, however, from the accompanying papers that the aforesaid order of dismissal was not issued as *a penalty* for disobedience. It was evidently issued after claimant had filed his letter of resignation, and it lacked, therefore, the color of a justifiable pretext under the regulations of the service. If a penalty, it would be synonymous with the enactment of law, *ex post facto*, or it would be equivalent to the infliction of punishment for a specified act of alleged disobedience, upon a wholly innocent person; but it must be perceived that to do either of these things would be alike repugnant to the spirit and to the intent of the pension system. Such a construction of the act of January 29, 1887, would be purely arbitrary—a sort of judicial legislation which is repulsive to the legal rights of claimants and, therefore, neither required by nor suitable to either the exigencies or the needs of the public service; and the Department declines to exercise adversely toward the claimant an authority which is not only questionable, but wholly unwarranted by considerations of justice.

(3) It appears from the accompanying papers that the claimant received not only extra pay for services rendered as a captain of infantry in the Mexican war, but also the distinction of a brevet for gallant and meritorious conduct in the battle of Cerro Gordo, April 18, 1847. Subsequent to these events, in 1850, claimant received a bounty-land warrant in recognition of his services in the Florida war of 1836, he having been commissioned for that war, in 1835. In view of these facts, and in the absence of all evidence to the contrary, it is a fair presumption that, at the time claimant received the aforesaid land warrant, he had a clean record not only in the Florida war, but in the later (Mexican) war, which had terminated two years prior to the date of said land warrant; while the reception by claimant of three months' extra pay for services as a captain in the Mexican war, as provided by the act of July 19, 1848, may be accepted as proof of an honorable discharge from service in the said (Mexican) war. In other words, he had been honorably discharged from that particular service for which pension is now claimed under the act of January 29, 1887, said act having exclusive reference to the Mexican war.

The inference is reasonable, from the foregoing facts, and should be maintained, that, in the absence of all evidence to the contrary, claimant was honorably discharged from the service in the Mexican war, in

which he had served not only sixty days, as required by the statute, but from the beginning to the ending of the struggle itself. Claimant thus complied with every specific requirement of the law, and his rights thereunder can not be impaired by the act of the Adjutant-General "dropping" his name from the rolls of the Army by an order dated April 11, 1861, said order having reference to a particular service subsequent to, and wholly separate from, that to which the law of January 29, 1887, applies.

(4) The main question that arises upon the consideration of this claim is almost identical with that which was raised in the case of the United States *vs.* North, on appeal from the United States Court of Claims, which was submitted November 20, 1884, and decided December 8, 1884 (see U. S. R., 112, p. 510). In that case, James H. North was an officer in the Navy of the United States from May 29, 1829, to January 14, 1861, when he resigned. He served in the war with Mexico as lieutenant on board the frigate *Potomac*, from February 10, 1846, until July, 1847, when his vessel sailed for the United States. The suit was brought to recover the three months' extra pay allowed to those who were engaged in the military service of the United States in the war with Mexico and were "honorably discharged," as provided by the acts of July 19, 1848, and February 19, 1879, and as likewise required by the act of January 29, 1887. The Supreme Court, in this case, decided, in effect, that the conclusion of the Mexican war was, in fact, the termination of the "engagement" of those who served therein, and was also equivalent to an "honorable discharge" of such persons as had fulfilled their engagements in said service. Mr. Chief-Justice Waite delivered the opinion of the court, saying:

> Those of the regular Army or Navy who were engaged in the military service of the United States in the war with Mexico may be said to have served out their term of engagement, or to have been honorably discharged within the meaning of those terms as used in the act of 1848, when the war was over, or when they were ordered or mustered out of that service. Being in the Army or Navy, their engagement was to serve whenever they were ordered for duty. Their engagement to serve in the war with Mexico *ended* when they were taken away from that service by proper authority.

This decision of the Supreme Court makes clear and conclusive, in the case of the United States *vs.* North, the fact, which is equally true as to the claim now under consideration, that the end of the war with Mexico was also the end of the particular service of those of the regular Army or Navy who were engaged in said war; and, by virtue of that fact, the ending of the war operated as an honorable discharge of such persons from said service.

Certain other considerations, in further support of claimant's appeal, might be added, but the reasons already given are deemed ample to warrant the Department in overruling the rejection of the pending claim and in respectfully requesting you to put claimant's name on the pension-roll, in accordance with the terms of the act approved January 28, 1887, and with the regulations of your office.

ATTORNEY'S FEE—NECESSARY SERVICES.

MILO B. STEVENS & CO.

The rules do not permit the recognition of an attorney in a case which was completed before he came into it. The law recognizes the fee in a pension case only as compensation for necessary services in the prosecution of it.

Assistant Secretary Hawkins to the Commissioner of Pensions, May 7, 1889.

Herewith are returned the papers which accompanied your report of the 26th of February, 1889, upon the appeal of Milo B. Stevens & Co., of Cleveland, Ohio, from the action of your office denying them a fee in the pension claim of Sarah Robertson, widow of William F. Robertson, No. 248103.

On the 10th of June, 1881, Mrs. Robertson filed an application for pension. On the 21st of March, 1883, a power of attorney from the claimant to Milo B. Stevens & Co. was filed. Her claim was rejected on the 1st of May, 1883, on the ground that the widow having remarried in November, 1874, she lost her title, under the law as it then existed, because of her failure to apply prior to the 1st of July, 1880.

On the 28th of December, 1885, William A. Robertson, as minor of the soldier, applied for the pension. Milo B. Stevens & Co. were appointed attorneys to prosecute the claim, and filed articles of agreement for a fee of $25. On the 2d of December, 1887, a certificate granting pension to the minor was issued. A fee of $25 was allowed to Milo B. Stevens & Co.

On the 30th of June, 1888, the widow of the soldier filed articles of agreement to allow Milo B. Stevens & Co. a fee of $25 on the successful prosecution of her claim for the *arrears* to which she was entitled under the proviso to the 1st section of the act of June 7, 1888, which directs that all pensions which have been, or may hereafter be, granted in consequence of death, occurring from a cause which originated in the service since the 4th of March, 1861, shall commence from the death of the husband.

On the 5th of October, 1888, a certificate was issued granting a pension to the widow for the period from December 6, 1870, the date of her husband's death, until November 19, 1874, the date of her remarriage. No attorney's fees were certified.

From this action as to the fee the appeal is taken.

At the time Messrs. Milo B. Stevens & Co. filed a power of attorney to prosecute the claim of the widow, under the act of August 7, 1888, for the pension from the date of her husband's death to the date of her remarriage, which was the only valid claim she ever presented, her right to the pension was fully shown. There was nothing for either an attorney or an agent to do in the matter of the prosecution of the claim, and the appellants were not recognized. The rules do not permit the *recognition of* an attorney in a case which was completed before he came

into it. The law recognizes the fee in a pension case only as compensation for necessary services in its prosecution. As Messrs. Stevens were paid for their services in the minor's claim, and as the evidence presented in that claim, in connection with a declaration not presented by the appellants, established the right of the widow, they are not entitled to a fee in her claim.

The action from which the appeal is taken is approved.

FEES FOR INCREASE—NEW DISABILITY.

MILO B. STEVENS & CO.

A contract for a fee may properly be made in relation to a claim for increase of pension on account of disabilities for which the pension has been allowed, in connection with a claim for additional pension on account of a new disability.

Assistant Secretary Hawkins to the Commissioner of Pensions, March 5, 1889.

Herewith are returned the papers which accompanied your report of the 26th of February, 1889, upon the appeal of Milo B. Stevens & Co., of this city, from the action of your office in the matter of the fee for the prosecution of the claim of Peter F. White for pension, certificate No. 335138.

On the 2d of November, 1877, Mr. White filed an application for pension in which he alleged disability from chronic diarrhea, rheumatism, disease of the heart and liver, fever, cough, shortness of breath, and inflammation and enlargement of the spleen. The attorney originally appointed abandoned the claim.

On the 25th of February, 1884, a power of attorney from the claimant to Milo B. Stevens & Co. was filed. On the 16th of August, 1884, they filed articles of agreement between themselves and the claimant for a fee of $25.

On the 11th of August, 1886, a certificate was issued granting pension on account of rheumatism and disease of the heart. A fee of $25 was paid to Messrs. Stevens & Co. under the contract as to the fee. On the 24th of May, 1887, additional pension was allowed on account of disease of the bowels. No fee was certified.

On the 22d of March, 1887, the pensioner filed an application for increase of pension on account of the disabilities for which the pension was allowed. Messrs. Stevens & Co. were appointed attorneys in the case. On the 28th of September, 1887, they filed articles of agreement for a fee of $25. On the 11th of October, 1887, they filed an informal declaration in which the applicant claimed increase of the disabilities for which he was pensioned, and also again alleging fever and disease of the lungs as additional causes of disability. On the 19th of December, 1887, they filed a formal declaration in which applicant alleged disability from disease of *lungs.*

On the 2d of October, 1888, a certificate was issued to increase the pension on account of the disabilities for which the pension was allowed, and to grant additional pension on account of disease of the lungs. A fee of $10 was paid to Milo B. Stevens & Co. Subsequently the contract fee of $25, less $10 previously paid, was certified to them.

The contention of the appellants is that the sum of $10 should not have been deducted from the fee set forth in the articles of agreement filed on the 28th of September, 1887; that the contract should be held to apply to the claim for pension on account of disease of lungs, that they are entitled to a fee of $10 upon the claim for increase of the pension on account of the disabilities for which the pension was before allowed, and that the additional amount of $10 should therefore be paid to them.

Your office acted upon the view that the articles of agreement filed on the 28th of September, 1887, should be held to relate to the claim on account of disease of the lungs, and the claim for increase of pension on account of the disabilities for which the pension was before allowed. It was evidently not the intention of the pensioner to pay a $10 fee on the claim for increase on account of the disabilities for which he was pensioned at the time in addition to a fee of $25 for the prosecution of the claim for additional pension on account of disease of the lungs. A contract for a fee may properly be made in relation to a claim for increase of pension on account of disabilities for which the pension has been allowed, in connection with a claim for additional pension on account of a new disability.

The action of your office refusing to allow an additional fee in the case, which is the only point raised by the appeal, is approved.

RELATION OF LINE OF DUTY TO PENSIONS.

(OPINION OF ATTORNEY-GENERAL CUSHING.)

*RELATION OF "LINE OF DUTY" TO PENSIONS.**

When the statute provides pension for disability or death occasioned by wounds or injuries received, casualty occurring, or disease contracted, in the line of duty, it intends that the performance of duty must have relation or causation or consociation, mediate or immediate, to the wound, the casualty, the injury, or the disease which produces the disability or death.

To determine the right of pension, the question is not whether, when the cause of disability or death occurred, the party was on duty or not in active service, or on furlough or leave, in arrest or not, but whether, in any of the possible conditions of service, the cause of disability or death was appurtenant to, dependent upon, or connected with acts within or acts without the line of duty.

Upon the question of casualty, the opinions of experts are evidence, but they do not constitute either exclusive or conclusive proof; and the question is to be judged by the real facts, like any other matter of evidence.

Where the proofs as to the question of actor and subject are balanced, and it is impossible to determine by them whether the case be one of contemporaneity or of collocation only, or of cause and consequence, it is a reasonable inference of public policy to presume in favor of the service.

It is according to public policy to presume in favor of the service where the line of duty enters potentially into the causes of disability or of death, although it be not certainly provable that it was the exclusive or predominant cause.

Attorney-General Caleb Cushing to the Secretary of the Interior.

ATTORNEY-GENERAL'S OFFICE,
May 17, 1855.

SIR: Your communication of the 15th of February, covering one from the Commissioner of Pensions of the same date, presents for consideration inquiry of the effect to be given to the phrase "while in the line of duty," which occurs in many of the pension laws of the United States.

My solicitude to relieve the impatience of parties interested in the decision of this question led me, on the 27th of the same February, to transmit a brief reply to your communication. I have now examined the whole matter in the light of the instructive arguments submitted by counsel, and desire to file the present as a more full and reflected opinion upon the same subject.

In stating the question, the Commissioner refers more particularly to the acts of March 3, 1817, and June 30, 1834; and, quoting the former of those acts, he says:

"The question is, what is the meaning of the words 'shall die * * * in consequence of disease contracted, or of casualties, or injuries re-

* This opinion of the late Caleb Cushing, who was Attorney-General of the United States, was prepared as the result of careful deliberation upon the elements which enter into the legal definition of *line of duty* in the military and naval service of the Government. It has been, since the date of its original publication, accepted as the basis and guide for the rulings of the Department with reference to the question which it exhaustively discusses; and it is reproduced here, from page 149, vol. vii, "Opinions of Attorneys-General," because of its great value to claimants for pension, and to their attorneys, and also in order to render it easily accessible by them.—EDITOR.

ceived, while in the line of his duty?' If it be satisfactorily proved that an officer had died in the service, without any evidence as to the origin of the cause of his death, is his widow entitled? If, in addition to the proof of death in service, the cause also be satisfactorily shown to have originated in the line of duty, shall she then be entitled? Or, shall not only the death in service, and the cause thereof in the line of duty, be shown, but must it also be shown that the cause was a consequence of such duty?"

Thus we perceive that the inquiry involves investigation, not only as to the conditions of fact which are to constitute the elements of the legal right of a party, but also as to the burden of proof and the presumptions of law or of fact involved in the establishment of any assumed conditions of right. It is this consideration—namely, the relation of the question of proofs to the very different and quite independent question of the rule of right—which has involved the subject in uncertainty, and left it apparently undetermined to the present late day.

For, as a matter of practical inquiry and of consequent decision in some shape, the question must have existed almost from the foundation of the Government, and not merely, as in the two acts cited by the Commissioner, in the naval service, but also in the military, and in such varieties of form as, it seems to me, to afford ample means of ascertaining the true legal intendment of the several acts of Congress.

Thus, in regard to the Navy, we have the old provision of the act of March 2, 1799, which is the original act for the government of the Navy, to the effect that "every officer, seaman, or marine *disabled in the line of his duty*, shall be entitled to receive for his own life, and the life of his wife, if a married man at the time of receiving the wound, one-half his monthly pay." (i Stat. at Large, p. 716.) Here it is the single case of disability by wound which constitutes the foundation of half-pay (or pension) to the party or to his widow; and the condition is disability *in the line of duty.*

So the act of March 16, 1802, fixing the military peace establishment of the United States, provides that—

"If any officer, non-commissioned officer, musician, or private, in the corps comprising the peace establishment, shall be disabled by wounds or otherwise, while in the line of his duty in public service, he shall be placed on the list of invalids of the United States, at such rate of pay and under such regulations as may be directed by the President of the United States for the time being." (ii Stat. at Large, p. 135.)

Here the foundation of invalid pay is enlarged to disability by wounds *or otherwise.* The condition remains of disability while in the line of duty.

Coming down to a later period, we have a series of acts in which the same idea appears.

Thus the act of January 20, 1813, provides a pension for the widow or children, in certain cases where "an officer of the Navy or marines

shall be killed or die by reason of a wound received in the line of his duty." (ii Stat. at Large, p. 790.)

Again, the act of March 4, 1814, provides that, if any officer, seaman, or marine, belonging to the Navy of the United States, shall die, or have died since a prescribed day, "by reason of a wound received in the line of his duty," then half-pay shall be paid to his widow, or, in certain cases, to his children, out of the Navy pension fund. (ii Stat. at Large, p. 103.)

Then comes the act cited by the Commissioner, which is of March 3, 1817, in addition to and in amendment of the foregoing, and which, not confining the groundwork of widow's and orphans' pensions to the death of an officer, seaman, or marine by wounds only, proceeds to supply the new causes of death of the party "in consequence of disease contracted or of casualties or injuries received while in the line of his duty." (iii Stat. at Large, p. 373.)

Here the condition of "line of duty" continues, while the scope of the admissible causes of death is extended beyond that of wounds, and as far perhaps as the causes of disability were by the word "otherwise" in the law above cited as to military half-pay.

Finally, in this part of the discussion, it remains only to cite the other of the two acts referred to by the Commissioner, that of June 30, 1834, which embraces officers of the Navy, seamen, and marines dying in the service "by reason of disease contracted or by casualties by drowning or otherwise, or of injuries received while in the line of their duty." (iv Stat. at Large, p. 714.)

The same expression occurs in a later act, that of July 21, 1848, except that the cases specified are only of "wounds received or of disease contracted in the line of duty;" thus presenting more plainly the identity of relation of "line of duty" to either wounds or disease. (ix Stat. at Large, p. 280.)

Here there is more specific designation of the admissible causes of death than in the other acts; but each of those causes, whether disease, or casualty, or injury, retains unchanged its relation to the condition of "while in the line of duty."

What, then, is the limitation implied by this relation? It is not all deaths, whether by wounds, disease, casualty, or injuries, which draw after them a pension, but only such as have relation to the line of duty. Without getting embarrassed here in the question of the distinction between *causa proxima* and *causa remota*, it suffices to say that, if casualty be the alleged cause of death, it must be casualty occurring while in the line of duty; if injury be the cause, it must be injury received while in the line of duty; if disease be the cause, it must be disease contracted while in the line of duty. And, assuming all this, the question recurs, what are the circumstances of death included or excluded by the prescribed condition?

To begin, it is conceded in all the arguments that, if the cause of

death intervene as the incident, or be the result of any misconduct or violation of duty, as by drunkenness or other vicious course of life, or in the act of mutiny, desertion, or other breach of military obligation, then the party does not die by disease contracted, casualty occurring, or injury received while in the line of duty. No man, it is clear, is acting in the line of duty while the act he performs is a violation of his duty. All such cases we exclude at once and by common consent from the purview of the pension laws.

Is that all? Are no other cases excluded? Is it the intent of the law to give a pension generally, as the normal fact, and with exception only of the few extraordinary cases of death proved to be the consequence of a palpable violation of duty? Or is the right of pension to be restricted to the cases of death having some proved or probable relation to duty, whether as causation or as a consociated circumstance? Upon this point there occurs much vagueness of thought, producing of course much contradicton of dictum and uncertainty of definition and of decision.

Thus, it is affirmed that precedents exist, on the files of the Pension Office, of pensions allowed in cases of disability or death by causes not attributable to, nor apparently connected with, public duty; nay, distinctly referable to foreign or independent causes. That may be. That is, cases may exist in which, according to the evidence on file, relation to public duty is not affirmatively proved, or in which the negative of it is the general sum of the evidence. But this avails nothing, since the allowances of the Commissioner are, for the most part, unaccompanied by written reasons of decision; and, if it were otherwise, decisions in the public offices of the Government are facts, not rules of law.

But the uncertainty of thought and conclusion in this matter appears in other forms than that of questionable precedents in the Pension Office. Thus, Mr. Secretary Ewing has said that, upon the question of pensions, as a general rule, in his opinion, "The soldier is to be regarded as being always in the 'line of his duty' when he is not under arrest, in confinement, on furlough, or absent without leave, although there may be peculiar circumstances in particular cases which should modify this construction." (Mayo's Pension Laws, p. 557, and Bennett's Digest, p. 132.)

This definition is made with reservation of undefined exceptions, and is therefore faulty; but it is also, in my opinion, faulty in what it expressly includes as well as in what it expressly excludes.

Take each of the cases of exclusion mentioned, and consider them.

A soldier or sailor, "while under arrest," or "in confinement," is not discharged from the obligation of duty, and is occasionally called upon to perform duty in which he may distinguish himself, and die honorably, and leave, it seems to me, a right of pension to his widow or children; as, for example, in the contingency of a post or a camp attacked by the enemy, or a ship in peril at sea. So, still more, of an officer on furlough. So it may be in case of a soldier temporarily "absent on

leave," nay, even of one compromised in some grave military offense. For, when violation of duty is taken as a rule of exclusion it operates, in my opinion, only where the violation of duty has probable relation to the cause of death; and not where these are independent facts. Thus, a sailor, who is laboring under all the worst effects of vicious indulgence, and subject to die at any moment of disease occasioned by that cause, may yet happen to die of other disease contracted, or of casualty occurring, or of injury received, while indubitably in the line of his duty, and so transmit a right of pension. In a word, these assumed causes of exclusion should operate not *per se*, but only where they affirmatively exclude the line of duty.

On the other hand, if these be the only cases of exclusion, then, what is left included can by no means be, as a whole, admitted. An officer or soldier who is neither under arrest, nor in confinement, nor on furlough, nor absent without leave, may yet die in a thousand ways which will be neither of disease contracted nor of casualties by drowning or otherwise, nor of wounds received while in the line of duty, as, for example, in a chance quarrel or in dangerous amusements; that is to say, the conditions of inclusion, as well as of exclusion, must have relation to the line of duty.

Thus, in one of the cases referred to in your letter, and upon which you have already ruled, a case of suicide, it was held, and properly, not only that suicide is not of itself a pensionable cause of death, but also that, if the suicide is alleged to have been produced by insanity, and thus insanity be put forward as the *causa causans*, then it must be shown that the insanity was the result of, or incidental to, acts of duty.

Another illustration of this idea occurs in the case ruled by Mr. Attorney-General Butler, of a soldier claiming invalid pension, who, in attempting to pass the guard with a written permit, was injured by the sentinel, but, as alleged, without provocation. In that case, it became necessary to inquire, first, as to the fact of provocation or not; "for, if the assault was brought on by the claimant by his own misconduct, he can not be said to have been disabled while in the line of his duty;" and secondly, whether he was about to pass the guard for some purpose growing out of or connected with the public service; "for if the pass was given to him solely for the purpose of enabling him to attend to his private affairs, and if, at the time he was injured, he was going about his private business, he can in no sense be considered as in the public service." (Mr. Butler's opinion, December 20, 1833.)

It may be suggested that this opinion turns on the words "in the public service," of the act of 1799. Not so; for, when the acts speak of "line of duty," they mean, of course, public duty. Undeniable tests of this truth will be perceived, on looking at the second and third of the three categories of the statute under consideration, namely, casualties by drowning or otherwise, and injuries received. It is impossible to say, that the phrase *casualties or injuries* received "in the line of duty"

comprehends all the possible misadventures of mere private life, which may happen to an officer in his personal affairs, and wholly disconnected from his public duty, though he be not on furlough. Suppose, for instance, that an officer is proprietor of a stock farm, or of a dwelling, or store-houses on rent, or is interested in a manufactory, as he has perfect right to be, and to which private property, without neglect of any public duty, he gives occasional attention; and suppose that, in the care of this property, he is killed by the kick of a vicious horse of his stock, or by fall from the scaffolding of one of his tenements in the course of reparation; can it be pretended that such a casualty or injury occurs "in the line of duty," as that phrase is employed in the pension acts? Most assuredly not.

In effect, all the serious controversy arises on questions of death by some of the infinite variety of diseases to which the human body is subject. In reference to this category of the statute, namely, death by disease contracted while in the line of duty, the proposition has been advanced that every person in the service who is not on furlough nor under arrest, and who dies of ordinary death in the course of nature not traceable to mere vice or other specific misconduct, in so dying devolves a right of pension on his widow or children; that is to say, that all cases of natural death, with some rare exceptions of disease of provable misbehavior, are deaths by disease contracted in the line of duty. It is further assumed that this doctrine is the settled law and long practice of the Government.

I can not yield assent to either of these propositions. The doctrine is not, in my judgment, a thing adjudicated; nor as a question of novel impression is it good law.

In support of the proposition that this point is a settled one, reference is made in the first place to alleged precedents in the Pension Office. I have already disposed of that argument.

Reference is made, in the next place, to the opinion of Mr. Ewing. I have already remarked on that in the view of it as a definition of the phrase "line of duty." Apart from which is this consideration: Mr. Ewing does not dispose of, nay, he does not allude to, the question when a disease can be said to be *contracted* in the line of duty. Two conditions have to co exist—the line of duty and a disease contracted therein. Whatever definition be given of the first condition, the second condition still remains to be defined, and it is not defined by Mr. Ewing.

But the assumption of adjudication rests mainly upon the language of an opinion of Mr. Attorney-General Rush; which, however, when attentively considered, is not found to support the assumption.

Mr. Rush was called upon to construe the words "or otherwise," in the act of 1799, which allows invalid pay to any officer, non-commissioned officer, or private, "disabled by wounds or otherwise while in the line of his duty in public service." Mr. Rush very properly declares, in the first place, that "or otherwise," includes disease or

casualty; and he proceeds, in the second place, to consider the relation of any casualty or disease to the line of duty in public service. (Mr. Rush's opinion, April 6, 1815.)

Now, in this act, as in all the others, the condition of "line of duty" stands in exactly the same relation to wounds, to drowning, or other casualty, and to personal injuries, as it does to diseases; and if Mr. Rush had, on this occasion, decided and settled the law to be, that all possible deaths by disease, happening to a person in the service, are of disease in the line of duty in the public service, he must in like manner have decided and settled the law to be that all possible wounds and casualties happening to a person in the service are in the line of duty in the public service. That he did not do this is proved by the point discussed and settled in the subsequent opinion of Mr. Butler, and by what is the well established and well understood rule of law in regard to the contingencies of personal rencounter producing wounds or death.

But the conclusive consideration is this: Although Mr. Rush in arguing the general question before him, namely, in what other way than by wounds must the disability have occurred to entitle the party to invalid pay, does let fall *arguendo* some general expressions, which give color to the present assumption; yet the inference deduced from these few questionable expressions is distinctly negatived by the fact, that all the numerous examples which he adduces in illustration or explanation of his idea are of diseases having veritable relation to military duty as effect to cause either in whole or in part.

He specifies, in the first place, cases of disability by *casualty*, that is, brought on by the direct agency of "accidents or inflictions," happening to the party "while in the immediate and obvious discharge of his duty;" and the cases are, of an officer who receives a sunstroke on parade, a musician who ruptures a blood vessel when obeying an order to sound his bugle, and a soldier who dislocates a limb while working upon fortifications.

He specifies, in the second place, two cases of disability by *disease* consequent on military duty, namely, rheumatism arising from marches in damp or cold weather, and fever produced by marshy exhalations in garrison.

He also suggests several of the philosophic elements of the question. He says, truly, that the connection between the cause and the effect need not always be so direct or instantaneous as in the case specified. It suffices, he says, if the disability "be plainly, though remotely, the incident and result of the military profession." He rightly assumes that the performance of duty may be received as the original cause of disability in some cases where it is not the proximate cause. He explains that it is not necessary that the casualty or disease should be in its nature "peculiar to the employments of military men." It may be loss of eyesight, occasioned by exposure; or consumption, the result of a cold aggravated by the labors and hazards of the profession; or palsy,

attributable to the change of habits in the transition from civil to military life. These are cases, he says, of disability in the line of duty, though they might have happened to the party in any other occupation.

I have thus brought forward all the cases which Mr. Rush specifies and reasons upon; and there is not one of them, I repeat, which has not relation of consequence or effect, either remote or proximate, to the performance of military duty.

Mr. Rush does, it is true, in the course of this opinion, employ some expressions, which, if they stood alone, might wear the appearance of undue generality. But these expressions are construed, as we have seen, by the examples he gives to elucidate his meaning, and also by their relation to the different branches of the subject. The latter qualification applies to the remark he makes, that permanent disability arising in the service is to be regarded, prima facie, as disability within the statute, which is a point on the question of evidence merely; and also to the remarks he makes on the meaning of the phrase "line of duty."

As to this, Mr. Rush frankly admits the difficulty he feels in fixing, by any undeviating standard, what is meant by being in the line of duty, and proceeds to state that "every officer in full commission, and not on furlough, must be considered in the line of his duty, although, at the moment, no particular or active duty is devolved upon him;" and "the same of a soldier (or sailor) who is kept in pay;" which definition he afterwards qualifies by introducing the exceptions of "voluntary absence" from duty, and of "vicious or unjustifiable conduct" while on duty. This definition fails to satisfy my mind, as does also that of Mr. Ewing, by reason of its regarding the "line of duty" as an absolute *status* of the party in service, when it is in truth a *status* relative to certain specific legal conditions. I shall suggest presently my own definition of this phrase, and show wherein it differs from that of Mr. Rush and Mr. Ewing.

This examination of the opinion of Mr. Rush has been made, not in the spirit of the criticism, but in that of sincere purpose to see what is the substantive doctrine at which he arrives; which doctrine, as explained by his own examples of its application, is also my doctrine, namely, that the cause of disability (or of death) upon which pension depends, must be a cause connected by some line of co-litigation with the performance of duty of an official or professional nature.

I start with the proposition that the true meaning of the phrase "line of duty" in the statute is the same whether the cause of disability or of death to be considered is a wound, a casualty, an injury, or a disease. The phrase stands in the same relation of contex and of construction to each and all of these contingencies. Whatever is of the essence of "line of duty" in any one of these cases is so in the others. Of course, it being established or admitted that a "wound" or death by personal violence, in order to become the foundation of pension, must have logi-

cal co-relation with military duty, it must be so in the case of "casualty" and of "disease."

I think, however, that on critical examination of the statutes the same conclusion as to disease would have to be admitted, even if that were the sole form of casualty set down in the statutes, and that no aid of construction existed in the enactment of other assigned causes of disability or of death.

Suppose the language of the law to be this, and no more, "disease contracted while in the line of duty," what would be the reasonable intendment of such language? We may feel our way to its true import, in the first place, by excluding that which it clearly does not say nor signify.

It does not say "disease contracted while in the service," and therefore is not co-extensive with the mere *status* of an officer in commission, or an enlisted soldier, sailor, or marine.

It does not say "disease contracted while in active service," and therefore is not designed to raise the question of whether on furlough, or leave of absence, or not.

It does not say "disease contracted while on duty," and is, therefore, independent of the condition of watch on deck or turn of detail in camp or garrison.

It does not say "any disease not the consequence of misconduct," and, if that had been the category contemplated by the legislator, he would have propounded it in simple and apt phraseology.

What the statute propounds as the basis of pension is not any of these things, but a very different one, and that announced in precise language having significancy of its own, namely, "disease contracted while in the line of duty." It would not have answered merely to say "in service," for that would have made the right of pension more extensive than the right of pay, so as, in all circumstances, to comprehend not only deaths of private misadventure, but even the case of criminality, arrest, or suspension under sentence. Nor would it have been satisfactory to say "in active service," for that is descriptive only of the orders under which the party may happen to be, and affords no sufficient indication of what is the nature or the quality of his acts. Nor would the wise intentions of the law have been fulfilled by merely saying, "while on duty," for, on one hand, a party, though on duty, might contract disease or come to his death by vice or crime; and, on the other hand, although not on duty, although on furlough, leave of absence, in arrest, under sentence and punishment for breach of duty, civil or military, yet in all these conditions his general military obligations continue in full force, and he has the faculty, and may have the occasion, in any of these conditions, to perform acts of pure military duty, and in the performance thereof to incur disease or death, in circumstances devolving on his widow or children the highest moral and the amplest legal right of pension allowance.

Instead of any of these imperfect expressions, the statute employs a phrase which is definite, though comprehensive, "the line of duty." He who contracts disease or dies in consequence of the ordinary performance of his military duty or in the performance of any special act of military duty, whether at the moment of performance he were on duty or off duty, in active service or on furlough, of habits virtuous or habits vicious, gallantly fighting his country's enemy, or expiating an offense in the guard-house or prison bay—he, I say, who, in these or any other circumstances, contracts disease in the performance of an act of duty, contracts it "in the line of his duty." On the other hand, neither the bad man, who dies of his incorrigible vices, nor the good man, who, at the full maturity of blameless life, dies in the course of nature of any of the maladies incident to old age, can be said to die of "disease contracted while in the line of duty." In fine, the phrase "line of duty" is an apt one, to denote that an act of duty performed must have relation of causation, mediate or immediate, to the wound, the casualty, the injury, or the disease producing disability or death.

There is another mode of stating these conclusions, which may serve to confirm or at least illustrate their truth.

Every person who enters the military service of the country—officer, soldier, sailor, or marine—takes upon himself certain moral or legal engagements of duty, which constitute his official or professional obligations. While in the performance of those things which the law requires of him as military duty, he is in the line of his duty. But, at the same time, though a soldier or sailor, he is not the less a man and a citizen, with private rights to exercise and duties to perform; and while attending to these things he is not in the line of his public duty. In addition to this, a soldier or sailor, like any other man, has the physical faculty of doing many things which are in violation of duties, either general or special; and in doing these things he is not acting in the line of his duty. Around all those acts of the soldier or sailor, which are official in their nature, the pension law draws a legislative line, and then they say to the soldier or sailor: If while performing these acts which are within that line you thereby incur disability or death you or your widow or children, as the case may be, shall receive a pension or other allowance; but not if the disability or death arise from acts performed outside of that line, that is, absolutely disconnected from and wholly independent of the performance of duty. Was the cause of disability or of death a cause within the line of duty or outside of it? Was that cause appertaining to, dependent upon, or otherwise necessarily and essentially connected with duty within the line, or was it unappurtenant, independent, and not of necessary and essential connection? That, in my judgment, is the true test criterion of the class of pension cases under consideration.

The proposed criterion is deduced from the nature of things. Congress, if it had so pleased, might have prescribed an arbitrary general

rule; as, for example, pension to all cases of disability or death in service, except in the contingency of misconduct; or pension for all cases, except where the cause of disability or death should occur while the party is in arrest or under sentence, on furlough, or leave of absence. Such a rule, like all other rules of an assumed arbitrary standard, might have been easier to administer than a natural rule; for the latter demands, in use, discriminating examination and just appreciation of the nature of the included subject-matter; but the natural rule is the only just and equitable one, whether as regards the right of persons in the service and their families, or the policy of the Government.

The proposed criterion may shut out some cases of a class, admitted heretofore through inadvertence, or from the absence of any definite rule whatever to work by, and the scope thus afforded for the action of biases and for mere discretion; as, for instance, disabilities or deaths produced by causes of disease or casualties having no relation whatever to the military service. True; and to pension disabilities or deaths occurring in the mere course of nature, and having no relation of casualty in duty, or disabilities or deaths produced by diseases or casualties happening to an officer or soldier in the prosecution and pursuit of his private affairs and amusements, or whilst employed on furlough in lucrative occupation, not official, is not required by any consideration of public service. On the other hand, the criterion proposed will bring in many cases heretofore excluded unjustly, and through disregard or non-perception of the true theory of reason, or right, and of public policy in these matters, which is, to bestow disability or death pensions only in those cases, but in all those cases where the cause of disability or death is the logical incident or provable effect of duty in the service.

Allow me, dismissing all further discussion of the cases thus excluded, to recall attention to the cases thus included.

When it is remembered that no commissioned officer, or enlisted soldier, seaman, or marine, has power to cast off his obligation at will; that whether he be on duty or off, in glory as in disgrace, still the banner of his country is over him and its oath upon his conscience; when this great fact shall be remembered, it must be inevitable to concede that any rule, based on the assumption of its being impossible for an officer or soldier on furlough, on leave of absence, in arrest, under sentence, to perform acts, suffer casualties, receive wounds, or incur causes of disease, in the line of his duty, is not a truth, and, like all things not true, can not be conformable to justice or wisdom. As, while on active duty, he may do or suffer things not in the line of his duty, so whilst off duty, or on furlough, or under censure, he may do and suffer things which are in the line of duty. The letter of the law prescribes that the quality of the act or condition, as whether in the line of duty or not in it, shall determine the question of pension; that alone is just and wise; and that is the thought which, according to my reading of the statutes, has, *from the* beginning of this course of legislation to the

end, held its place with unchangeable constancy in all the acts of Congress.

The idea that furlough, or leave of absence, must of necessity exclude an officer from all benefits of the pension laws may have arisen from the fact that officers are furloughed, or put on leave of absence, from time to time, for the purpose of enabling them to enter into lucrative private pursuits, or for some other cause, which implies negation of public duty. In such cases the officer will of course be excluded from the purview of the pension laws, not because of the furlough or leave of absence, *per se*, but because of the special occasion or consequences thereof.

In regard to arrest, again, suppose that on march, in camp or garrison, or on a voyage, an officer is put in arrest on charges. In the first place, those charges may not be substantiated, and then it would be manifestly unjust that the mere fact of his being charged should operate to deprive himself or his family of pension. Or, while he is in arrest, he dies of camp fever or ship fever, and then it is unjust to presume a criminality not proved in the course of law. Or, whether guilty or not, if he dies of wounds, casualty, or disease contracted while in arrest, still the death is not the consequence of the arrest, but of the public service. If not dying in arrest, and on trial being convicted and sentenced, that sentence being of death or dismissal for some grave military crime, that of course terminates the question of pension; but if his offense be a light one, with a sentence of reprimand, for instance, and he shall have happened to contract disability or mortal disease while in arrest, as by the hazards of a long march or voyage, it seems not just to add to his legal sentence the serious indirect aggravation of incapacity of pension. All these difficulties are avoided or conciliated by directing inquiry to the question, Was the cause of disability or death, or was it not, an act of his official military duty?

I believe that the views thus presented constitute a reply to the compound question proposed by the Commissioner, in all its parts, except such as are questions of evidence. All these questions are referable to settled principles, and may be disposed of in a few words.

In the first place, casualty is a question of fact, to be proved according to the ordinary rules of evidence, and to the reasonable satisfaction of the inquiring and deciding mind. That mind is entitled to have the very facts before it, and is not bound to accept as final the opinions even of an expert. Such opinions are evidence, but neither conclusive nor exclusive proof. Every person of judicial training well knows that the opinions of medical or other scientific or practical experts often differ, and that they sometimes err in a body as if by some epidemic contagion. There is a judicial case involving scientific inquiry, in the printed record of which are the answers of twenty-three experts to the same question; twenty-two of them give decision one way, and a single one of them gives a reverse decision; and, in the conclusion, it was proved, beyond

all controversy, that he alone was right, and that all the others erred. In general, the opinions of an expert are of more or less weight and value, according to the person's constitution of mind and the degree of completeness of the collection of pertinent facts on which his mind acts. But it may happen that the great body of the wisest and learnedest men of science shall be possessed by an erroneous opinion, while the true secret of nature is revealed to some discoverer, who, as yet, is unknown to the world, and is painfully struggling up into the sunlight of greatness and of fame. In a word, no witness, whether expert or not, can rightfully claim to have his opinion take the place of the facts, and so to substitute his judgment for that of the Commissioner.

In the second place, the question of the quality or degree of proof requisite is a question clearly for the conscience of the Commissioner. If called upon to suggest any rule for the guidance of his discretion in the matter, it would be obvious for you to say that the pension laws are beneficial in their nature, and therefore to be construed beneficially in matters of inevitable doubt. In this view, it seems to me, not that the mere fact of an officer having died in the service, and with utter absence of proof as to the origin or cause of his death, suffices to raise a pension; but that where the proofs are balanced, and it is impossible to determine by them as to the fact of "disease contracted," and the fact of "line of duty," found in juxtaposition, whether this collocation be of contiguity only, or of actor and subject—of contemporaneity or sequence only, or of cause and consequence—it would be reasonable to presume in favor of the pension; and also to presume in favor of the pension in cases where the line of duty appears to enter potentially into the causes of the death, although it should happen not to be certainly provable that it was the exclusive or predominant cause; so that a possible error of absolute and mere uncertainty shall not be suffered to defeat the liberal intentions and beneficial policy of the Government.

I have the honor to be, very respectfully,

C. CUSHING.

HON. ROBERT MCCLELLAND,
Secretary of the Interior.

BOUNTY-LAND LAWS,

REVISED AND CONSOLIDATED

BY THE ACT ENTITLED

AN ACT TO REVISE AND CONSOLIDATE THE STATUTES OF THE UNITED STATES IN FORCE ON THE FIRST DAY OF DECEMBER, ANNO DOMINI ONE THOUSAND EIGHT HUNDRED AND SEVENTY-THREE,"

APPROVED

JUNE 22, 1874.

CHAPTER TEN.

(Revised Statutes.)

BOUNTY-LAND.

Sec.
2414. Military bounty-land warrants and locations assignable.
2415. Warrants located at $1.25; excess paid in cash.
2416. Claims for bounty-lands in virtue of certain acts named, etc.
2417. Same subject.
2418. Bounty-lands for soldiers in certain wars.
2419. Certain classes of persons in the Mexican war, their widows, etc., entitled to forty acres.
2420. Militia and volunteers in service since 1812.
2421. Persons entitled under preceding sections.
2422. Period of captivity added to actual service.
2423. Warrant and patent to issue when.
2424. Widows of persons entitled.
2425. Additional bounty-lands, &c.
2426. Classes under last section specified.
2427. What classes of persons entitled under section 2425, without regard to length of service.
2428. Widows and children of persons entitled under section 2425.
2429. Subsequent marriage of widow.
2430. Minors under section 2428.
2431. Proof of service.
2432. Former evidence of right to bounty-land to be received in certain cases.
2433. Allowance of time of service for distance from home to place of muster or discharge.
2434. Indians included.
2435. Former evidence of right to a pension to be received in certain cases, on application for bounty-land.
2436. Sales, mortgages, letters of attorney, etc., made before issue of warrant to be void.
2437. Warrants to be located free of expense by Commissioner of Land-Office, etc.
2438. Deserters not entitled to bounty-land.
2439. Lost warrants, provisions for.
2440. Discharges, omissions and loss of, provided for.
2441. New warrant issued in lieu of lost warrant.
2442. Regulations by Secretary of Interior.
2443. Mode of issuing patents to the heirs of persons entitled to bounty-lands.
2444. Death of claimant after establishing right and before issuing of warrant.
2445. When proofs may be filed by legal representatives.
2446. Relocation of military bounty-land warrants in cases of error.

Military bounty-land warrants and locations assignable.

22 March, 1852, c. 19, s. 1, v. 10, p. 3.
3 June, 1858, c. 84, s. 2, v. 11, p. 309.

SEC. 2414. All warrants for military bounty-lands which have been or may hereafter be issued under any law of the United States, and all valid locations of the same which have been or may hereafter be made, are declared to be assignable by deed or instrument of writing made and executed according to such form and pursuant to such regula-

tions as may be prescribed by the Commissioner of the General Land Office, so as to vest the assignee with all the rights of the original owner of the warrant or location.

Warrants located at $1.25; excess paid in cash.

22 March, 1852, c. 19, s. 1, v. 10, p. 3.

SEC. 2415. The warrants which have been or may hereafter be issued in pursuance of law may be located according to the legal subdivisions of the public lands in one body upon any lands of the United States subject to private entry at the time of such location at the minimum price. When such warrant is located on lands which are subject to entry at a greater minimum than one dollar and twenty-five cents per acre, the locator shall pay to the United States in cash the difference between the value of such warrants at one dollar and twenty-five cents per acre and the tract of land located on. But where such tract is rated at one dollar and twenty-five cents per acre, and does not exceed the area specified in the warrant, it must be taken in full satisfaction thereof.

Claims for bounty-lands in virtue of certain acts named.

2 July, 1864, c. 226, s. 2, v. 13, p. 379.

SEC. 2416. In all cases of warrants for bounty lands, issued by virtue of an act approved July twenty-seven, one thousand eight hundred and forty-two, and of two acts approved January twenty-seven, one thousand eight hundred and thirty-five, therein and thereby revised, and of two acts to the same intent, respectively, approved June twenty-six, eighteen hundred and forty-eight, and February eight, eighteen hundred and fifty-four, for military services in the revolutionary war, or in the war of eighteen hundred and twelve with Great Britain, which remained unsatisfied on the second day of July, eighteen hundred and sixty-four, it is lawful for the person in whose name such warrant issued, his heirs or legal representatives, to enter in quarter sections at the proper local land-office in any of the States or Territories, the quantity of the public lands subject to private entry which he is entitled to under such warrant.

Same subject.

2 July, 1864, c. 226, s. 2, v. 13, p. 379.

SEC. 2417. All warrants for bounty-lands referred to in the preceding section may be located at any time, in conformity with the general laws in force at the time of such location.

Bounty-lands for soldiers in certain wars.

28 Sept., 1850, c. 85, s. 1, v. 9, p. 520.

11 Feb., 1847, c. 8, s. 9, v. 9, pp. 125, 126.

SEC. 2418. Each of the surviving, or the widow or minor children of deceased, commissioned and non-commissioned officers, musicians, or privates, whether of regulars, volunteers, rangers, or militia, who performed military service in any regiment, company, or detachment in the service of the United States in the war with Great Britain, declared on the eighteenth day of June, eighteen hundred and twelve, or in any of the Indian wars since seventeen hundred and

ninety, and prior to the third of March, eighteen hundred and fifty, and each of the commissioned officers who was engaged in the military service of the United States in the war with Mexico, shall be entitled to lands as follows: Those who engaged to serve twelve months or during the war, and actually served nine months, shall receive one hundred and sixty acres, and those who engaged to serve six months, and actually served four months, shall receive eighty acres, and those who engaged to serve for any or an indefinite period, and actually served one month, shall receive forty acres; but wherever any officer or soldier was honorably discharged in consequence of disability contracted in the service before the expiration of his period of service, he shall receive the amount to which he would have been entitled if he had served the full period for which he had engaged to serve. All the persons enumerated in this section who enlisted in the Regular Army, or were mustered in any volunteer company for a period of not less than twelve months, and who served in the war with Mexico and received an honorable discharge, or who were killed or died of wounds received or sickness incurred in the course of such service, or were discharged before the expiration of the term of service in consequence of wounds received or sickness incurred in the course of such service, shall be entitled to receive a certificate or warrant for one hundred and sixty acres of land; or, at option, Treasury scrip for one hundred dollars, bearing interest at six per cent. per annum, payable semi-annually, at the pleasure of the Government. In the event of the death of any one of the persons mentioned in this section during service, or after his discharge, and before the issuing of a certificate or warrant, the warrant or scrip shall be issued in favor of his family or relatives; first, to the widow and his children; second, his father; third, his mother; fourth, his brothers and sisters.

Certain classes of persons in the Mexican war, their widows, etc., entitled to forty acres.

11 Feb., 1847, c. 8, s. 9, v. 9, p. 126.

SEC. 2419. The persons enumerated in the preceding section received into service after the commencement of the war with Mexico, for less than twelve months, and who served such term, or were honorably discharged, are entitled to receive a certificate or warrant for forty acres, or scrip for twenty-five dollars, if preferred; and in the event of the death of such person during service, or after honorable discharge before the eleventh of February, eighteen hundred and forty-seven, the warrant or scrip shall issue to the wife, child, or children, if there be any, and, if none, to the father, and if no father, to the mother of such soldier.

Militia and volunteers in service since 1812.

22 March, 1852, c. 19, s. 4, v. 10, p. 4.

SEC. 2420. Where the militia, or volunteers, or State troops of any State or Territory, subsequent to the eighteenth day of June, eighteen hundred and twelve, and prior to March twenty-second, eighteen hundred and fifty-two, were called into service, the officers and soldiers thereof shall be entitled to all the benefits of section two thousand four hundred and eighteen upon proof of length of service as therein required.

Persons not entitled under preceding sections.

28 Sept., 1850, c. 85, s. 1, v. 9, p. 520.

SEC. 2421. No person shall take any benefit under the provisions of the three preceding sections if he has received, or is entitled to receive, any military land bounty under any act of Congress passed prior to the twenty-second March, eighteen hundred and fifty-two.

Period of captivity added to actual service.

28 Sept., 1850, c. 85, s. 2, v. 9, p. 520.

SEC. 2422. The period during which any officer or soldier remained in captivity with the enemy shall be estimated and added to the period of his actual service, and the person so retained in captivity shall receive land under the provisions of sections twenty-four hundred and eighteen and twenty-four hundred and twenty, in the same manner that he would be entitled in case he had entered the service for the whole term made up by the addition of the time of his captivity, and had served during such term.

Warrant and patent to issue when.

28 Sept., 1850, c. 85, s. 3, v. 9, p. 520.

SEC. 2423. Every person for whom provision is made by sections twenty-four hundred and eighteen and twenty-four hundred and twenty shall receive a warrant from the Department of the Interior for the quantity of land to which he is entitled; and, upon the return of such warrant with evidence of the location thereof having been legally made, to the General Land Office, a patent shall be issued therefor.

Widows of persons entitled.

28 Sept., 1850, c. 85, s. 3, v. 9, p. 520.

SEC. 2424. In the event of the death of any person for whom provision is made by sections twenty-four hundred and eighteen and twenty-four hundred and twenty, and who did not receive bounty-land for his services, a like warrant shall issue in favor of his widow, who shall be entitled to one hundred and sixty acres of land in case her husband was killed in battle; nor shall a subsequent marriage impair the right of any widow to such warrant, if she be a widow at the time of making her application.

Additional bounty-lands, etc.

3 March, 1855, c. 207, ss. 1, 3, v. 10, pp. 701, 702.

SEC. 2425. Each of the surviving persons specified in the classes enumerated in the following section, who has served for a period of not less than fourteen days in any of the wars in which the United States have been engaged since the year seventeen hundred and ninety and prior to the third day of March, eighteen hundred and fifty-five, shall be entitled to receive a warrant from the Department of the Interior for one hundred and sixty acres of land; and,

where any person so entitled has, prior to the third day of March, eighteen hundred and fifty-five, received a warrant for any number of acres less than one hundred and sixty, he shall be allowed a warrant for such quantity of land only as will make, in the whole, with what he may have received prior to that date, one hundred and sixty acres.

Classes under last section specified.

SEC. 2426. The classes of persons embraced as beneficiaries under the preceding section are as follows, namely:

3 March, 1855, c. 207, ss. 1, 8, 10, v. 10, p. 701. 14 May, 1856, c. 26, ss. 4, 5, v. 11, pp. 8, 9.

First. Commissioned and non-commissioned officers, musicians, and privates, whether of the regulars, volunteers, rangers, or militia, who were regularly mustered into the service of the United States.

Second. Commissioned and non-commissioned officers, seamen, ordinary seamen, flotilla-men, marines, clerks, and landsmen in the Navy.

Third. Militia, volunteers, and State troops of any State or Territory, called into military service and regularly mustered therein, and whose services have been paid by the United States.

Fourth. Wagon-masters and teamsters who have been employed under the direction of competent authority, in time of war, in the transportation of military stores and supplies.

Fifth. Officers and soldiers of the Revolutionary war, and marines, seamen, and other persons in the naval service of the United States during that war.

Sixth. Chaplains who served with the Army.

Seventh. Volunteers who served with the armed forces of the United States in any of the wars mentioned, subject to military orders, whether regularly mustered into the service of the United States or not.

What classes of persons entitled under section 2425, without regard to length of service.

SEC. 2427. The following class of persons are included as beneficiaries under section twenty-four hundred and twenty-five, without regard to the length of service rendered:

3 March, 1855, c. 207, ss. 3, 9, 11, v. 10, p. 702.

First. Any of the classes of persons mentioned in section twenty-four hundred and twenty-six who have been actually engaged in any battle in any of the wars in which this country has been engaged since seventeen hundred and ninety, and prior to March third, eighteen hundred and fifty-five.

Second. Those volunteers who served at the invasion of Plattsburgh, in September, eighteen hundred and fourteen.

Third. The volunteers who served at the battle of King's Mountain, in the Revolutionary war.

Fourth. The volunteers who served at the battle of Nick-*ojack against the* confederate savages of the South.

Fifth. The volunteers who served at the attack on Lewistown, in Delaware, by the British fleet, in the war of eighteen hundred and twelve.

Widows and children of persons entitled under section 2425.

SEC. 2428. In the event of the death of any person who would be entitled to a warrant, as provided in section twenty-four hundred and twenty-five, leaving a widow, or, if no widow, a minor child, such widow or such minor child shall receive a warrant for the same quantity of land that the decedent would be entitled to receive, if living on the third day of March, eighteen hundred and fifty-five.

3 March, 1855, c. 207, s. 2, v. 10, p. 702.

Subsequent marriage of widow.

SEC. 2429. A subsequent marriage shall not impair the right of any widow, under the preceding section, if she be a widow at the time of her application.

3 March, 1855, c. 207, s. 2, v. 10, p. 702.

Minors under section 2428.

SEC. 2430. Persons within the age of twenty-one years on the third day of March, eighteen hundred and fifty five, shall be considered minors within the intent of section twenty-four hundred and twenty eight.

3 March, 1855, c. 207, s. 2 v. 10, p. 702.

Proof of service.

SEC. 2431. Where no record evidence of the service for which a warrant is claimed exists, parol evidence may be admitted to prove the service performed, under such regulations as the Commissioner of Pensions may prescribe.

3 March, 1855, c. 207, s. 3, v. 10, p. 702.

Former evidence of right to bounty-land to be received in certain cases.

SEC. 2432. Where certificate or a warrant for bounty-land for any less quantity than one hundred and sixty acres has been issued to any officer or soldier, or to the widow or minor child of any officer or soldier, the evidence upon which such certificate or warrant was issued shall be received to establish the service of such officer or soldier in the application of himself, or of his widow or minor child, for a warrant for so much land as may be required to make up the full sum of one hundred and sixty acres, to which he may be entitled under the preceding section, on proof of the identity of such officer or soldier, or, in case of his death, of the marriage and identity of his widow, or, in case of her death, of the identity of his minor child. But if, upon a review of such evidence, the Commissioner of Pensions is not satisfied that the former warrant was properly granted, he may require additional evidence, as well of the term as of the fact of service.

14 May, 1856, c. 26, s. 1, v. 11, p. 8.

Allowance of time of service for distance from home to place of muster or discharge.

SEC. 2433. When any company, battalion, or regiment, in an organized form, marched more than twenty miles to the place where they were mustered into the service of the United States or were discharged more than twenty miles from the place where such company, battalion, or regiment was organized, in all such cases, in computing the length of service of the officers and soldiers of any such company, battalion, or regiment, there shall be allowed one day for

14 May, 1856, c. 26, s. 7, v. 11, p. 9. 22 March, 1852, c. 19, s. 5, v. 10, p. 4.

every twenty miles from the place where the company, battalion, or regiment was organized to the place where the same was mustered into the service of the United States, and one day for every twenty miles from the place where such company, battalion, or regiment was discharged, to the place where it was organized, and from whence it marched to enter the service, provided that such march was in obedience to the command or direction of the President, or some general officer of the United States, commanding an army or department, or the chief executive officer of the State or Territory by which such company, battalion, or regiment was called into service.

Indians included.

SEC. 2434. The provisions of all the bounty-land laws shall be extended to Indians, in the same manner and to same extent as to white persons.

3 March, 1855, c. 207, s. 7, v. 10, p. 702.

Former evidence of right to a pension to be received in certain cases on application for bounty-land.

SEC. 2435. Where a pension has been granted to any officer or soldier, the evidence upon which such pension was granted shall be received to establish the service of such officer or soldier in his application for bounty-land; and upon proof of his identity as such pensioner, a warrant may be issued to him for the quantity of land to which he is entitled; and in case of the death of such pensioned officer or soldier, his widow shall be entitled to a warrant for the same quantity of land to which her husband would have been entitled, if living, upon proof that she is such a widow; and in case of the death of such officer or soldier, leaving a minor child and no widow, or where the widow may have deceased before the issuing of any warrant, such minor child shall be entitled to a warrant for the same quantity of land as the father would have been entitled to receive if living, upon proof of the decease of father and mother. But if, upon a review of such evidence, the Commissioner of Pensions is not satisfied that the pension was properly granted, he may require additional evidence, as well of the term as of the fact of service.

14 May, 1856, c. 26, s. 2, v. 11, p. 8.

Sales, mortgages letters of attorney, &c., made before issue of warrant to be void.

SEC. 2436. All sales, mortgages, letters of attorney, or other instruments of writing, going to affect the title or claim to any warrant issued, or to be issued, or any land granted, or to be granted, under the preceding provisions of this chapter, made or executed prior to the issue of such warrant, shall be null and void to all intents and purposes whatsoever; nor shall such warrant, or the land obtained thereby, be in anywise affected by, or charged with, or subject to, the payment of any debt or claim incurred by any officer or soldier, prior to the issuing of the patent.

28 Sept., 1850, c. 83, s. 4, v. 9, p. 521.

Warrants to be located free of expense by Commissioner of Land-Office, &c.

28 Sept., 1850, c. 85, s. 4, v. 9, p. 521.

SEC. 2437. It shall be the duty of the Commissioner of the General Land-Office, under such regulations as may be prescribed by the Secretary of the Interior, to cause to be located, free of expense, any warrant which the holder may transmit to the General Land-Office for that purpose, in such State or land-district as the holder or warrantee may designate, and upon good farming-land, so far as the same can be ascertained from the maps, plats, and field-notes of the surveyor, or from any other information in the possession of the local office, and, upon the location being made, the Secretary shall cause a patent to be transmitted to such warrantee or holder.

Deserters not entitled to bounty-land.

28 Sept., 1850, c. 85, s. 1, v. 9, p. 520. 3 March, 1855, c. 207, s. 1, v. 10, p. 701.

SEC. 2438. No person who has been in the military service of the United States shall, in any case, receive a bounty-land warrant if it appears by the muster-rolls of his regiment or corps that he deserted or was dishonorably discharged from service.

Lost warrants, provisions for.

27 April, 1816, c. 127, s. 1, v. 3, p. 317.

SEC. 2439. When a soldier of the Regular Army, who has obtained a military land-warrant, loses the same, or such warrant is destroyed by accident, he shall upon proof thereof, to the satisfaction of the Secretary of the Interior, be entitled to a patent in like manner as if the warrant was produced.

Discharges, omissions, and loss of, provided for.

27 April, 1816, c. 127, s. 2, v. 3, p. 317.

SEC. 2440. In all cases of discharge from the military service of the United States of any soldier of the Regular Army, when it appears to the satisfaction of the Secretary of War that a certificate of faithful services has been omitted by the neglect of the discharging officer, by misconstruction of the law, or by any other neglect or casualty, such omission shall not prevent the issuing of the warrant and patent as in other cases. And when it is proved that any soldier of the Regular Army has lost his discharge and certificate of faithful service, the Secretary of War shall cause such papers to be furnished such soldier as will entitle him to his land-warrant and patent, provided such measure is justified by the time of his enlistment, the period of service, and the report of some officer of the corps to which he was attached.

New warrant issued in lieu of lost warrant.

23 June, 1860, c. 203, s. 1, v. 12, p. 90.

SEC. 2441. Whenever it appears that any certificate or warrant, issued in pursuance of any law granting bounty-land, has been lost or destroyed, whether the same has been sold and assigned by the warrantee or not, the Secretary of the Interior is required to cause a new certificate or warrant of like tenor to be issued in lieu thereof; which new certificate or warrant may be assigned, located, and patented in like manner as other certificates or warrants for

bounty-land are now authorized by law to be assigned, located, and patented; and in all cases where warrants have been, or may be, re issued, the original warrant, in whosoever hands it may be, shall be deemed and held to be null and void, and the assignment thereof, if any there be, fraudulent; and no patent shall ever issue for any land located therewith, unless such presumption of fraud in the assignment be removed by due proof that the same was executed by the warrantee in good faith and for a valuable consideration.

Regulations by Secretary of Interior.

23 June, 1860, c. 203, s. 2, v. 12, p. 91.

SEC. 2442. The Secretary of the Interior is required to prescribe such regulations for carrying the preceding section into effect as he may deem necessary and proper, in order to protect the Government against imposition and fraud by persons claiming the benefit thereof; and all laws and parts of laws for the punishment of frauds against the United States are made applicable to frauds under that section.

Mode of issuing patents to the heirs of persons entitled to bounty-lands.

3 March, 1843, res. No. 7, v. 5, p. 650.

SEC. 2443. In all cases where an officer or soldier of the revolutionary war, or a soldier of the war of eighteen hundred and twelve, was entitled to bounty-land, has died before obtaining a patent for the land, and where application is made by a part only of the heirs of such deceased officer or soldier for such bounty-land, it shall be the duty of the Secretary of the Interior to issue the patent in the name of the heirs of such deceased officer or soldier, without specifying each; and the patent so issued in the name of the heirs, generally, shall inure to the benefit of the whole, in such portions as they are severally entitled to by the laws of descent in the State or Territory where the officer or soldier belonged at the time of his death.

Death of claimant after establishing right and before issuing of warrant.

3 June, 1858, c. 84, s. 1, v. 11, p. 308.

SEC. 2444. When proof has been or hereafter is filed in the Pension-Office, during the lifetime of a claimant, establishing, to the satisfaction of that office, his right to a warrant for military services, and such warrant has not been, or may not be, issued until after the death of the claimant, and all such warrants as have been heretofore issued subsequent to the death of the claimant, the title to such warrants shall vest in his widow, if there be one, and if there be no widow, then in the heirs or legatees of the claimant; and all military bounty-land warrants issued pursuant to law shall be treated as personal chattels, and may be conveyed by assignment of such widow, heirs, or legatees, or by the legal representatives of the deceased claimant, for the use of such heirs or legatees only.

When proofs may be filed by legal representatives.

3 March, 1869, c. 138, v. 15, p. 336.

SEC. 2445. The legal representatives of a deceased claimant for a bounty-land warrant, whose claim was filed prior to his death, may file the proofs necessary to perfect such claim.

Relocation of military bounty-land warrants in cases of error.

3 March, 1855, c. 147, s. 1, v. 10, p. 256.

SEC. 2446. Where an actual settler on the public lands has sought, or hereafter attempts, to locate the land settled on and improved by him, with a military bounty-land warrant, and where, from any cause, an error has occurred in making such location, he is authorized to relinquish the land so erroneously located, and to locate such warrant upon the land so settled upon and improved by him, if the same then be vacant, and if not, upon any other vacant land, on making proof of those facts to the satisfaction of the land-officers, according to such rules and regulations as may be prescribed by the Commissioner of the General Land-Office, and subject to his final adjudication.

The following sections of the Revised Statutes are added for the information of claimants for bounty-land and other persons.

Claims of disloyalists.

Joint resolution 2 March, 1867.

SEC. 3480. It shall be unlawful for any officer to pay any account, claim, or demand against the United States which accrued or existed prior to the thirteenth day of April, eighteen hundred and sixty-one, in favor of any person who promoted, encouraged, or in any manner sustained the late rebellion, or in favor of any person who during such rebellion was not known to be opposed thereto, and distinctly in favor of its suppression; and no pardon heretofore granted, or hereafter to be granted, shall authorize the payment of such account, claim or demand, until this section is modified or repealed. But this section shall not be construed to prohibit the payment of claims founded upon contracts made by any of the departments, where such claims were assigned or contracted to be assigned prior to the first day of April, eighteen hundred and sixty-one, to the creditors of such contractors, loyal citizens of loyal States, in payment of debts incurred prior to the first day of March, eighteen hundred and sixty-one.

Penalty for false affidavit and post-dating of vouchers, etc.

3 March, 1873, c. 234, s. 33, v. 17, p. 575.

SEC. 4746. Every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit concerning any claim for pension, or payment thereof, *or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions*, or who knowingly or willfully presents, or causes to be presented, at any pension agency any power of attorney or other paper required as a voucher in drawing a pension, which paper bears a date subsequent to that on which it was actually signed

or executed, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term not exceeding three years, or by both.

Commissioner to furnish printed instructions, free of charge.

3 March, 1873, c. 234, s. 22, p. 573.

SEC. 4748. That the Commissioner of Pensions, on application being made to him in person, or by letter, by any claimant or applicant for pension, bounty-land, or other allowance required by law to be adjusted or paid by the Pension Office, shall furnish such person, free of all expense, all such printed instructions and forms as may be necessary in establishing and obtaining said claim; and on the issuing of a certificate of pension or of a bounty-land warrant, he shall forthwith notify the claimant or applicant, and also the agent or attorney in the case, if there be one, that such certificate has been issued, or allowance made, and the date and amount thereof.

Forging, counterfeiting, or passing military bounty-land warrants.

5 Feb., 1859, c. 23, v. 11, p. 381.

SEC. 5420. Every person who falsely makes, alters, forges, or counterfeits any military bounty-land warrant or military bounty-land warrant certificate issued or purporting to have been issued by the Commissioner of Pensions under any act of Congress, or any certificate of location of any military bounty-land warrant, or any duplicate thereof, or military bounty-land warrant certificate upon any of the lands of the United States, or any certificate of the purchase of any of the lands of the United States, or any duplicate certificate of the purchase of any of the lands of the United States, or any receipt for the purchase-money of any of the lands of the United States, or any duplicate receipt for the purchase-money of any lands of the United States, issued or purporting to have been issued by the register and receiver at any land-office of the United States, or by either of them, or who passes, utters, or publishes as true any false, forged, or counterfeited military bounty-land warrant, military bounty-land warrant certificate, certificate of location, or duplicate certificate of location, certificate of purchase, duplicate certificate of purchase, receipt, or duplicate receipt, for the purchase-money of any of the lands of the United States, knowing the same to be false or forged, shall be imprisoned at hard labor not less than three years nor more than ten years.

Forging deed, power of attorney, etc.

3 March, 1823, c. 38, s. 1, v. 3, p. 771.

SEC. 5421. Every person who falsely makes, alters, forges, or counterfeits, or causes or procures to be falsely made, altered, forged, or counterfeited, or willingly aids or assists in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain

or receive from the United States, or any of their officers or agents, any sum of money, or who utters or publishes as true, or causes to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, or other writing with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, or who transmits to, or presents at, or causes or procures to be transmitted to, or presented at, any office or officer of the Government of the United States any deed, power of attorney, order, certificate, receipt, or other writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall be imprisoned at hard labor for a period of not less than one year nor more than ten years, or shall be imprisoned not more than five years and fined not more than one thousand dollars.

Attorney for pensions demanding more than legal fee, etc.

3 March, 1873, c. 234, s. 31, v. 17, p. 575.

SEC. 5485. Any agent or attorney, or any other person instrumental in prosecuting any claim for pension or bounty-land, who shall directly or indirectly contract for, demand, or receive or retain any greater compensation for his services, or instrumentality in prosecuting a claim for pension or bounty-land than is provided in the title pertaining to pensions, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or the land-warrant issued to any such claimant, shall be deemed guilty of a high misdemeanor, and, upon conviction thereof, shall for every such offense be fined not exceeding five hundred dollars, or imprisonment at hard labor not exceeding two years, or both, at the discretion of the court.

Officers, etc., interested in claims.

26 Feb., 1853, c. 81, s. 2, v. 10, p. 170.

SEC. 5498. Every officer of the United States or person holding any place of trust or profit, or discharging any official function under or in connection with any Executive Department of the Government of the United States, or under the Senate or House of Representatives of the United States, who acts as an agent or attorney for prosecuting any claim against the United States, or in any manner, or by any means, otherwise than in discharge of his proper official duties, aids or assists in the prosecution or support of any such claim, or receives any gratuity or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall pay a fine of not more than five thousand dollars, or suffer imprisonment not more than one year, or both.

INDEX TO DECISIONS.

BOUNTY LANDS.

BOUNTY-LAND RIGHTS:

Where it appears that, under the law as it existed before the passage of the Revised Statutes, a claimant was entitled to bounty land, the Department holds that his right thereto still exists, inasmuch as section 5597 of the Revised Statutes provides that the repeal of the several acts embraced in said revision shall not affect any right under the laws thereby repealed, but such rights shall exist in the same manner as if said acts had not been repealed.

Daniel S. Lockridge 368

DISLOYALTY.

DISLOYAL SERVICE, A BAR TO CLAIM:

The fact of service in the late "Confederate" army is a bar to the payment of any account, claim, or demand against the United States which accrued or existed prior to the 13th day of April, 1861, in favor of any person who promoted, encouraged, or in any manner sustained the late rebellion, etc.; nor has the Department any authority to modify these conditions by construing alleged private sentiments of claimant as proof of loyalty whilst engaged in said service.

Thomas B. Booth 299

DISLOYALTY—ACT OF MARCH 3, 1877:

1. Enlistment and muster defined.
2. Muster presupposes a regular enlistment.
3. The term "voluntarily enlisted," in the act of March 3, 1887, construed and applied.
4. Pension laws should be so construed as to carry into effect the real design of the law-making power.

Cornelius Warren 278

ADULTEROUS COHABITATION.

RESTORATION—ADULTEROUS COHABITATION:

Where there exists absolute proof of one act of adultery, resulting in the birth of a child, and, subsequently to said act and birth, the adulterous parties continuously sustain toward each other the relations of *apparent* illicit intercourse, the reasonable and conclusive *presumption* is that said relations are actually those of adulterous cohabitation; and the woman, if a widow and mother, can not claim pensionable *dependence* on account of the death of either a husband or a son whose death may have occurred prior to the beginning of the aforesaid adulterous habit, or anterior to the aforesaid relations of apparent cohabitation with a paramour.

Caroline, mother of Charles Knappenberger 56

ADULTEROUS COHABITATION:

1. The statute of August 7, 1882, appertaining to adulterous cohabitation, must be construed as having a retrospective as well as a prospective bearing in relation to the pensionable rights of widows who may have or may become guilty of open and notorious adulterous cohabitation; otherwise, the purpose of the law would be defeated. Having directed that a soldier's widow upon her remarriage should lose all claim to pension, the intention of Congress in passing the act of August 7, 1882, was to subject to a similar deprivation such widows as, without formal and legal marriage, led lives of shame, and thereby brought dishonor upon the memory of their husbands.
2. The essential feature of adultery, in its strict signification, is the criminal act of a married person, but the crime is committed whether the accomplice be married or single. Congress did not intend to deprive soldiers' widows of the governmental bounty when criminally intimate with married persons and, at the same time, to ignore this crime when committed with persons who were not bound by the ties of marriage.

Minerva, widow of Washington C. Beede 119

MINORS' PENSION.

MINORS' PENSION—MILITIA SERVICE:

1. A member of the militia of any State, serving under the orders of an officer of the United States, can NOT be pensioned for disabilities incurred in the line of duty, unless his claim was prosecuted to a successful issue prior to July 4, 1874. (Section 4702, Revised Statutes.)
2. The limitation, as to the period within which the claim of a State militiaman can be prosecuted to a successful issue is directly imposed by section 4702, Revised Statutes, upon the claim of his minor children, and there is no portion of any law that repeals or in any manner modifies this provision of said section.

Minors of Hamilton S. Wilson..... 364

COLORED MINORS' CLAIM:

The Department holds that the provisions of section 4705, Revised Statutes, relating to the marriage of colored and Indian soldiers and sailors, must be strictly construed and be squarely and fully complied with, in order that those who seek the benefits thereby conferred may be entitled to them.

Children of Peter Williams..... 383

MARRIAGE—REMARRIAGE.

MARRIAGE—LEX LOCI:

1. In determining the validity of a marriage the Department recalls section 2 of the act approved August 7, 1882, amending section 4702 of the Revised Statutes, which provides that "marriages, except as are mentioned in section 4705 of the Revised Statutes, shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of marriage, or at the time the right to pension accrued."
2. It is a settled ruling of the courts, both State and Federal, that a "marriage, valid at common law, is valid, notwithstanding the statutes of the State where it is contracted prescribe directions respecting its formation and solemnization, unless they contain express words of nullity."

Fanny, alleged widow of Frank H. Curtis (col.)..... 159

WIDOW'S REMARRIAGE—ACT OF MARCH 9, 1878:

1. The law of March 9, 1878, whereby the widow of a soldier who served fourteen days in the war of 1812 is entitled to a pension on account of her deceased husband, can not be construed to act retrospectively; and, therefore, the inhibition contained in section 2 of said law does not include nor affect the cases wherein the widows of soldiers of the war of 1812 had remarried, but whose second marriage had been dissolved by either death or divorce, prior to the passage of the law. The law can not be properly construed to act retrospectively, unless the intent of Congress that it should have such effect be clearly and conclusively enunciated.
2. The purpose of the act of March 9, 1878, was to create for widows a new claim to pension, on account of the service of their husbands in a certain war, but which claim should go into operation only after the passage and approval of the act itself.

Ellen Morrison, widow of Daniel Milliken 100

WIDOW'S REMARRIAGE—ACT OF MARCH 9, 1878:

The Department, on a motion for reconsideration, adheres to and reaffirms the decision rendered in this case on appeal April 26, 1888. (P. D., 2d Vol., page 100.)

Ellen Morrison, widow of Daniel Milliken (reconsideration) 272

NEGLIGENCE—ACCIDENT.

CONTRIBUTORY NEGLIGENCE:

Where total deafness exists, the claimant, knowing his condition, is required to exercise that care and caution which ordinary prudence would dictate in order to avoid harm or peril, and a failure to do so is equivalent to such contributory negligence as renders the injury thereby incurred non-pensionable. the said injury not being exclusively due to the total deafness that had been contracted by reason of the service.

Thomas S. Bennett 9

NEW EXAMINATION—CONTRIBUTORY NEGLIGENCE:

1. While the Department adheres to the policy of granting a new special examination, affording claimant an opportunity to cross-examine witnesses in all cases, where the evidence obtained by the old *ex parte* system is material to the proper determination of the claim, yet it would be absurd to extend the policy to claims wherein such new examination can have no effect upon the ultimate decision.
2. Where either a disability or a death is the result of gross carelessness, the doctrine of contributory negligence applies, and consequently no title to pension follows.

George Solomon 29

CONTRIBUTORY NEGLIGENCE:

1. To establish a claim for increase of pension by reason of secondary or contributory cause of disability, claimant must clearly prove, by competent and satisfactory evidence, that the accident resulting in the injury relied upon as the basis of his claim was directly occasioned by his previously-incurred disability, and was not the result of negligence or carelessness or risk on his part, nor of a lack of that care and caution which should be exercised by one in a disabled condition.

CONTRIBUTORY NEGLIGENCE—Continued.

2. Where a person voluntarily places himself in a position of peril or of hazard, he thereby takes upon himself all the risks so incurred, and is alone responsible for any injury that may result therefrom.

Phebe, widow of Clark J. Castalor 32

ACCIDENTAL PISTOL-SHOT WOUNDS:

1. A pistol is not properly a part of an infantry soldier's equipment, and the Department holds that, where an infantry soldier incurred an accidental wound by the dropping of a pistol from his own person, even though the soldier had been granted "permission" to carry the weapon when on duty, there is no legal basis for pension.
2. Where an infantry soldier, carrying, by "permission," a pistol on his person, fails to comply with the requirements of the service in handling the weapon, he is guilty of "gross carelessness and contributory negligence," if thereby an accidental wounding ensue; and such wounding will not be pensionable.

George M. Beeler 116

INSANITY.

DISABILITY FROM INSANITY—RE-ISSUE AND RERATING:

1. Where the alleged insanity of claimant is adjudged to have originated during his military service, to have existed also in a pensionable degree at the date of discharge, and to have continued in a pensionable degree from that date, the Department holds that claimant is included in the exception named in the proviso which section 2 of the act of March 3, 1879, contains—by virtue of which exception "insane persons and children under sixteen years of age" are excluded from the operation of the rule which requires applications for arrears of pension to be filed "prior to the 1st day of July, 1880."
2. The Department re-affirms the ruling whereby ratings which are allowed in conformity with medical recommendations, from time to time, are approved as describing the nature and covering the extent of claimant's disability.

Alban G. Stabler for Edward Campbell, alias Henry Mulholland 75

PENSION FOR INSANITY—DATE OF ALLOWANCE:

The effect of proviso in section 2, act of March 3, 1879, excepting from the limitations therein cited, with reference to arrears of pension, claims filed by or in behalf of insane persons, is to practically expunge from said act the aforesaid limitations so far as they might otherwise relate to claims based upon insanity alleged to be due to the line of duty in the service. Therefore, by reason of that proviso, the allowance of pension for insanity can not be restricted to the date of filing claim, but must relate back to and begin from the date of soldier's discharge from the service.

Alban G. Stabler (for Henry Mulholland), appeal reconsidered 176

INSANITY—ACT OF MARCH 3, 1879:

The Department holds that "the terms of the proviso contained in section 2 of the act of March 3, 1879, excepting claims by or in behalf of insane persons from the limitation prescribed therein, have the effect of eliminating from said statute said limitation so far as all such claims are concerned;" and, therefore, where insanity is alleged as the basis of a claim for pension and it is established that said insanity was incurred in the line of duty, or by reason of military service, said claim must be adjudicated, so far as the question of *arrears* of pension is concerned, without reference to the aforesaid limitation, and as if no such limitation had ever been prescribed.

Ellen Roberts, guardian of William Roberts 350

ATTORNEYS' FEES.

NEW DISABILITY—ATTORNEY'S FEE:

The phrase "a new disability" means a disability not connected as a result with the disability for which pension was first allowed, or a disability the origin of which in the service and line of duty must be proved in the same manner as if it alone were the subject of the claim; and attorneys will not be allowed a fee for an increase of pension on account of an increase of the disability for which pension was originally granted.

Milo B. Stevens & Co. (motion for reconsideration) 236

SEPARATE DISABILITIES—ATTORNEY'S FEE:

Where a claimant files a declaration for pension based upon two separate causes of disability, and, in contract for fee to be paid his attorney, no reference is made to a particular part of the declaration, it is held that the intention of the claimant was to pay the fee named in the contract for the prosecution of the whole claim, embracing *both* or *all* alleged causes of disability, and not for the prosecution of only a part of it.

Milo B. Stevens & Co 235

ATTORNEY'S FEE—RIGHTFUL ATTORNEY:

1. Where an attorney filed a declaration for widow's pension under the act of January 29, 1887, but said declaration was executed April 20, 1886, nearly nine months before the passage of the aforesaid act, the Department holds that such a declaration, for lack of validity, can not confer upon claimant nor upon said attorney any right under said act, although it appears that said declaration was not filed until *after* the passage of the act itself.
2. The evidence necessary to obtain pension under the act of January 29, 1887, must be presented in accordance with such rules or regulations as the Secretary of the Interior may prescribe under said act; but if, at the time (April 20, 1886) the declaration of claimant was executed, no such rules or regulations had been prescribed, then the claimant could not derive any benefit, under said act, from said informal declaration, nor could the person who filed it be properly recognized by the Commissioner of Pensions as claimant's attorney, and entitled to a fee.
3. The declaration of claimant, executed and filed subsequent to the passage of the act of January 29, 1887, in accordance with the rules and regulations prescribed under the act by the Secretary of the Interior, is accepted by the Department as the instrument that lawfully carries with it the attorney's fee, and the attorney who files such declaration is alone entitled to recognition by the Commissioner of Pensions as the rightful attorney in the claim.

C. D. Pennebaker, jr., attorney 257

FEE AGREEMENTS:

Fee agreements which are not executed in accordance with the specific requirements of law can not be recognized by the Department; and claims in which such defective agreements are filed must be considered as though no fee agreement had been filed, but in which the law authorizes a fee not exceeding $10.

W. H. Dearer, attorney 194

ATTORNEY'S FEE—NECESSARY SERVICES:

The rules do not permit the recognition of an attorney in a case which was completed before he came into it. The law recognizes the fee in a pension case only as compensation for necessary services in the prosecution of it.

Milo B. Stevens & Co 396

FEES FOR INCREASE—NEW DISABILITY:

A contract for a fee may properly be made in relation to a claim for increase of pension on account of disabilities for which the pension has been allowed, in connection with a claim for additional pension on account of a new disability.

Milo B. Stevens & Co 399

FULFILLMENT OF FEE AGREEMENTS:

The Department holds that when a claim is made on account of two or more disabilities and a certificate issued for pension on account of one disability, the attorney's work is not done, if claimant desire to prosecute the claim on account of the other disabilities. The attorney's contract with the claimant is construed as an agreement to prosecute the claim on account of both or all the disabilities named therein, and claimant is not required by law to pay more than one fee for the entire service.

Milo B. Stevens & Co, attorneys 195

ERRONEOUS CERTIFICATION:

Error on part of the Commissioner of Pensions in certifying fee to an attorney not entitled to certification shall not impair the rights of the lawful attorney in the claim, but the Commissioner shall correct said error by requiring the mistaken recipient of the fee to refund the same to the true attorney, who had been clearly recognized in the record, and who had filed the evidence upon which the claim itself was prosecuted to a favorable issue.

Milo B. Stevens & Co, attorneys 208

INCREASE OF PENSION:

Where a soldier's pension is increased by operation of law, the increase being granted upon the evidence already filed with the original application, no attorney's fee will be allowed, inasmuch as "the attorneys rendered no service which was necessary to the allowance of the claim." (See acts June 8, 1872, June 18, 1874, August 4, 1886.)

Milo B. Stevens & Co., attorneys 226

MAXIMUM FEE—SEPARATE CAUSES:

The Department holds that, when an attorney files a contract for fees, he is bound by it to prosecute the claim for all the causes that have been alleged as the basis for pension and which are pending before the Bureau of Pensions; nor will the attorney be permitted to duplicate his fees in any claim by prosecuting separately the different pensionable causes that have been alleged in said claim.

Maurice Langhorne, attorney 211

INCREASED DISABILITY:

Inasmuch as the second proviso of section 4780 of the Revised Statutes, as amended by the act of July 4, 1884, directs that "no greater fee than $10 shall be demanded, received, or allowed in any claim for increase of pension on account of increase of the same disability" for which the pension was originally granted, the Commissioner of Pensions is precluded from allowing to attorneys a fee in excess of $10 in the case under consideration, even though claimant had entered into a contract for the payment of $25.

Milo B. Stevens & Co., attorneys 162

INCREASE OF PENSION:

Where an attorney claims a fee for alleged services in the procurement of an increase of pension, but it appears that said increase was the result of the mere operation of a law of Congress, the claim should be denied, the payment of a fee in such cases being unlawful under the provision of the act of July 4, 1884, which says that "no fee shall be demanded, received, or allowed in any claim for arrears of pension, or arrears of increase of pension allowed by any act of Congress passed subsequent to the date of the allowance of the original claim in which such arrears of pension or of increase of pension may be allowed."

Milo B. Stevens & Co., attorneys 161

NEGLECT TO PROSECUTE:

1. The failure of attorneys to file any paper in a claim or to perform any service for more than two years is sufficient evidence of neglect to bring them within the provisions of Rule No. 16, regulating practice before the Bureau of Pensions, and in the absence of any sufficient cause shown therefor, is conclusive evidence of abandonment, and authorizes the Commissioner of Pensions to recognize another attorney.
2. Mere private records, kept in attorneys' office, are not to be received as proof of due diligence. Such diligence must be shown by the state of the record in the claim.

Milo B. Stevens & Co., attorneys 163

ATTORNEY'S FEES:

Where a pensioner has filed through his attorney at different periods two distinct claims for increase of pension and, the Bureau of Pensions having considered the first claim, no effort is made to have it reconsidered, the Department holds that whatever payment the pensioner may have made to his attorney for the prosecution of the first claim can not be properly deducted from the legal fee of $10 for the prosecution of the second or latter claim for increase of pension.

Charles and William B. King 130

ATTORNEY'S FEE:

Where increase of pension is granted on account of the same disability for which the soldier was originally pensioned, and there appear to have been involved in attorneys' service no extraordinary "trouble and difficulty," said attorneys should not be allowed a fee to exceed $10, inasmuch as the law provides that "no greater fee than $10 shall be demanded, received, or allowed in any claim for increase of pension on account of the increase of the disability for which the pension had been allowed."

Milo B. Stevens & Co 132

MINORS' PENSION:

1. Where there are several children entitled to pension, and one of them dies while the claim is pending, the case does not come within the provisions of section 4718 of the Revised Statutes. The word "person" in that section, in its application to the claims of minor children, is understood to embrace *all* the minors. Section 4718 has no application to such a claim so long as any one of those entitled survives.
2. Where there are two or more minors entitled to pension, and one of them dies while the claim is pending, there is no warrant of law for making any deduction from the amount of pension to be paid up to the date of the death of that one. After the death of said minor, the survivor or survivors are entitled to the full amount of pension previously paid.

John S. Shults 388

INCREASE OF DISABILITIES—FEE AGREEMENTS:

The law provides that a contract for a fee of $25 may be filed and will be recognized in claims for increase on account of a *new* disability, but can not be recognized, nor will a fee of more than $10 be either certified or paid to attorneys, in claims for increase on account of the same disabilities for which pension has already been allowed. (See act of July 4, 1884.)

Milo B. Stevens & Co., attorneys 190

SEPARATE CAUSES OF DISABILITY—ATTORNEY'S FEE:

1. Two or more causes of disability, alleged by an applicant for an original pension, which are pending at the same time, and in which the applicant is represented by one attorney or firm, constitute but one claim.
2. The law does not contemplate the presentation of several claims for one pension by more than one attorney, nor the allowance of more than one fee for the prosecution of one claim, except as is expressly provided in the case of a new disability.
3. The expression "a new disability" is held to refer to a disability alleged for the first time in a declaration filed after a certificate for a portion of the pension has been granted.

James H. Aldrich 339

OVERPAYMENT—ATTORNEY'S FEE:

Where the Commissioner of Pensions failed to direct that the full amount of the fee due to attorneys under contract be deducted from the widow's pension, which had accrued on the application of the late husband, the Department holds that the payment of said pension should be treated as an *overpayment* to the extent of the *balance* of the fee, and therefore the amount of said balance should be deducted from the pension the widow is now receiving and paid to the attorney.

John Zimmer 341

MINORS' PENSION—ATTORNEY'S FEE:

Where there are two or more minors entitled to pension and one of them dies while the claim is pending, there is no warrant of law for making any deduction from the amount of pension to be paid up to the death of that one. After the death of that minor, the survivor or survivors are entitled to the full amount of pension previously paid; and therefore the attorney in such claim is entitled to the full amount of fee set forth in the articles of agreement.

Charles E. Fairman, attorney 355

MINOR'S CLAIM:

The Department holds that conclusive evidence, showing the date of birth, and therefore the correct age of a minor at the time of soldier's death, is necessary to the allowane of a minor's claim to pension.

Julia M. B. and Susana Wilkerson 250

RES ADJUDICATA.

RECONSIDERATION—RES ADJUDICATA:

The Department will not review nor reconsider questions in appeals for rehearing, unless it be definitely shown by competent evidence that some error has been committed, or that the new evidence and new facts would materially change the former conclusion. In the absence of such new and material evidence, the merits of the claim, as passed upon, are *res adjudicata*.

John Swartz 3

RES ADJUDICATA:

Repeated appeals of the same claim, based upon the same or upon merely cumulative evidence, which does not and can not affect the status of the claim itself, are inconsistent with the spirit and purpose of honest litigation, and must be halted by the doctrine of *res adjudicata*, the fair and vigorous application of which facilitates the business of the Department and promotes the aims of justice in administering pension legislation; and hence the Department will not overturn nor reconsider the adjudication of a claim decided by the present or by the former administration, except upon the production by claimant of an overshadowing reason.

Edward A. Colnor 21

RES ADJUDICATA:

Where a claim has been fully considered and adjudicated on its own merits adversely to claimant, the Department will not re-open the same for reconsideration, unless there be offered "new and material evidence" in addition to that upon which the former decision was based.

John H. Gleason 106

RES ADJUDICATA:

The doctrine of *res adjudicata* is applicable where an appeal, having been once decided adversely by the Department, is again presented for consideration, but is not accompanied by such "new and material evidence" as would have changed the status of the claim had it been offered upon the former adjudication of said appeal.

Ann Eliza, widow of Louis S. Blake 111

RE-ADJUSTMENT OF RATINGS:

1. The rule of *res adjudicata*, as applied by the Department, was stated in the case of Tyner Noah, N. (P. D. Vol. 1, p. 21) as follows: "It has uniformly refused to disturb an adjudication of a claim by a former administration, except upon the most conclusive evidence that error has been committed. When the question as to the propriety of a given rating is one of judgment merely, depending upon the weight of evidence, it will not allow the opinion of to-day to overturn the opinion of yesterday. But where the incorrectness of the former action is so manifest upon a review of the evidence that it is not a matter of dispute, the Department will not refuse to do justice because the error is of long standing and has been sanctioned by subsequent action."
2. Section 4714 of the Revised Statutes, defining the jurisdiction of the Commissioner of Pensions, authorizes him to detail from time to time clerks or persons employed in his office to make special examinations into the merits of such pension, or bounty land claims, whether pending or adjudicated, as he may deem proper, and to aid in the prosecution of any party appearing on such examinations to be guilty of fraud, etc.; and the act of Congress approved June 21, 1879, directs that "the Commissioner of Pensions shall have the same power as heretofore to order special examinations whenever, in his judgment, the same may be necessary, and to increase or reduce the pension according to right and justice; but in no case shall a pension be withdrawn or reduced except upon notice to the pensioner and a hearing upon sworn testimony, except as to the certificate of the examining surgeon."

Wallace G. Bone 310

RERATING:

The Department re-affirms the ruling that old cases, long since adjudicated by previous administrations, will not be re-opened, reconsidered, nor re-adjusted, except upon the presentation of "new and material evidence" tending to show the existence of a palpable error or mistake, and which, therefore, tends to change the real status of the claimant before the Department. Such cases are clearly within the rule of *res adjudicata*.

George S. Newton 144

PRACTICE.

RECONSIDERATION:

The Department holds that old cases, long since adjudicated by previous administrations, will not be re-opened, nor reconsidered, nor re-adjusted upon the mere allegation of the pensioner that proper weight had not been given to the evidence in the original adjudication. It will be done only upon conclusive and palpable evidence of error.

Chambers C. Mullin 18

LAWFUL ATTORNEY—ABANDONMENT:

The neglect of an attorney, when called upon by the Commissioner of Pensions, to file additional evidence that may be necessary to the favorable adjudication of a claim, and the consequent necessity for the substitution and recognition of another attorney in the successful adjudication of said claim, should be construed as equivalent to the abandonment of the claim itself by the former attorney, and, therefore, to a forfeiture of his fee agreement for obtaining certificate of pension. The attorney who prosecutes the claim to a successful termination is the one entitled to the fee.

Joseph H. Hunter 189

INTERLOCUTORY RULINGS:

1. Upon an appeal to the Secretary of the Interior from an adverse interlocutory ruling of the Commissioner of Pensions pending the consideration of a claim by the Bureau of Pensions, the Department holds that such an appeal can not be entertained until the Bureau of Pensions has finally adjudicated the claim itself.
2. Appeals from the Bureau of Pensions to the Secretary of the Interior are governed by the same general rules as regulate the granting of appeals from any tribunal having original jurisdiction to a tribunal having appellate jurisdiction over the matters in controversy.

John W. Morris 73

SECOND APPEALS—NEW EVIDENCE:

The Department re-affirms the doctrine that "only new evidence will entitle a case to consideration upon a second appeal—such evidence as would ordinarily entitle a party to a new trial or to a rehearing, under the well-known rules of practice in courts of law, except in cases of palpable error or mistake." [Rueb, Louis, vol. 1, P. D., p. 390.]

Simeon White 210

ESTOPPEL.

ESTOPPEL—SUCCESSIVE ENLISTMENTS:

A soldier's second enlistment in the Army raises the reasonable presumption that he had recovered from whatever disability he had incurred in his first service, and operates as an estoppel upon his claim for pension. If, at his second enlistment, he conceals any disability which he had contracted in his first service, public policy requires that he shall be estopped from denying the truthfulness of statements which he may have made to the recruiting officer to whom he offered himself for re-enlistment.

John H. McLaughlin 85

SECOND AND THIRD ENLISTMENTS:

A second enlistment raises the presumption that, if any disability had been contracted in the first service, the claimant had recovered from it; and this presumption will stand until clearly disproved.

SECOND AND THIRD ENLISTMENTS—Continued.

A third enlistment and service raise the presumption that no pensionable degree of disability was incurred in the soldier's second service; and this presumption is made conclusive by the absence of testimony showing such a degree of disability at discharge or thereafter, and by the certificate of the medical examination of the soldier showing no disability at that date, from the cause alleged.

David G. Rummel 91

DEATH CAUSE—ESTOPPEL:

Where a soldier failed in his original declaration to allege rheumatism as a disability, and failed, also, to furnish the Department with evidence of its existence during his life-time, the presumption arises that said disease did not exist in the service and did not result therefrom. This presumption is so strong as not to be overcome or outweighed by the testimony given years subsequent to discharge by officers, comrades, and neighbors, unsupported by either record or medical evidence as to the existence of rheumatism in the service or immediately thereafter; and the aforesaid failure to allege rheumatism serves to estop the present allegement of that disease as the cause of soldier's death, for the purpose of securing widow's pension.

Laura, widow of John L. Wright 253

MEDICAL CERTIFICATES—RECORD.

CERTIFICATE OF DISABILITY—ADVERSE RECORD:

The certificate of disability is the expert medical official registration of an existing fact, required by law to be recorded, made in compliance with law and in the line of duty; and the Department holds that such a certificate so far imports verity that it can not be overcome by the affidavit of the surgeon who signed it. A certificate of disability for discharge can be overcome by only the most positive and conclusive evidence of fraud or of mistake.

Henry Halstead 221

BOARD OF SURGEONS' CERTIFICATES:

The certificate or report of a board of examining surgeons, in determining the nature and degree of a disability, should be given precedence over an examination by a single surgeon; and the certificates of examining surgeons can be neither set aside nor controverted by affidavits of family physicians or of neighbors, especially where such certificates are made by boards of examining surgeons who, acting under instructions from the Bureau of Pensions, certify to the nature and degree of a disability, after careful investigation.

Francis N. Barnard 244

CERTIFICATE OF DISABILITY—CONFLICTING EVIDENCE:

A certificate of disability upon which a soldier was discharged from the service may be overthrown by conflicting evidence given years subsequent thereto by credible and corroborating witnesses, the statements contained in said certificate not being in themselves conclusive as to the facts to which they relate.

Jacob S. Probasco 285

INCREASE:

The Department will accept as conclusive of purely medical questions the opinions of the medical referee in preference to those of family physicians, the conclusion of the former being much the same as expert testimony in a court of law.

Ziba Yarnell 85

CERTIFICATE OF DISABILITY—PENSIONABLE CAUSE:

1. Neither *ex parte* testimony contained in the affidavit of claimant nor the evidence of comrades relating to the incurrence of an alleged disability can be accepted as sufficient to overcome the statements embraced in the certificate of disability upon which the soldier was discharged, inasmuch as such statements are deemed conclusive evidence of the facts set forth, unless either fraud or mistake be apparent upon the face of the certificate itself, or be otherwise clearly established by competent evidence.
2. The Department holds that disabilities from disease or from injuries, to be pensionable, must be of such a character and exist to such a degree as to be liable to detection by examining surgeons whose official duty it is to ascertain the facts after careful examination and report them to the Bureau of Pensions.

Albert T. Chapin 254

RESTORATION—CERTIFICATE OF DISABILITY:

Where the verbal evidence relating to the origin and character of the claimant's disabilities is conflicting, but claimant has both a hospital record and a certificate of disability corroborating his declaration and explicitly stating that his alleged disabilities were incurred in the line of duty, the conflicting verbal testimony should be eliminated from the case; and claimant's hospital record, fortified by the aforesaid certificate, will be accepted as conclusive evidence in support of his title to pension, unless there appear palpable fraud or error in said record evidence; and where said claimant's name was dropped from the roll of pensioners on account of the aforementioned conflicting verbal evidence, it should be restored in conformity with the rulings of the Department relating to the superior value as evidence of a hospital record and of a surgeon's certificate of disability over mere verbal testimony.

Joseph D. Sawyer 122

OVERPAYMENT—FRAUD.

OVERPAID PENSION—RE-IMBURSEMENT:

1. Where pension money is illegally paid to and received by a pensioner whilst in the service, the sum so paid is regarded as being "in direct violation of the statutory provision (viz, section 4724) positively forbidding such payment or receipt," and, therefore, as being "a positive, actual *fraud* upon the Government." It is further held that the Government may re-imburse itself for such illegal overpayment by withholding pension money falling due to the aforesaid pensioner.
2. The conclusions reached in the decision of the case of James Moss, March 28, 1881, are erroneous, and said decision is reversed in so far as it is inconsistent with the present ruling of the Department.

Cyrus Fike 65

MEXICAN WAR.

COMMENCEMENT OF MEXICAN WAR:

The original date of the war with Mexico was not determined by a diplomatic quarrel, but by an actual overt hostile act, inaugurating the conflict on the part of Mexico, April 24, 1846, to which reference was made by Congress in the preamble to the act of May 13, 1846.

Thomas Daly 220

DISCHARGE FROM SERVICE.

DISHONORABLE DISCHARGE:

The soldier, the late husband of claimant, having been dishonorably discharged from the service, the widow occupies no better position and can have no better right to pension than the soldier, who, if he had presented a claim for pension in his life-time, would have been debarred by the evidence proving the aforesaid "dishonorable discharge." (Kaufman, Daniel B., 1 Pension Decisions, p. 383.)

Fredericka, widow of Henry Woerheide 146

HONORABLE DISCHARGE—MEXICAN WAR:

1. The Department enforces the decision of the Supreme Court of the United States in the case of James H. North (U. S. R., 112, p. 510), Chief-Justice Waite delivering the opinion, to the effect that "Those of the regular Army and Navy, who were engaged in the military service of the United States in the war with Mexico, may be said to have served out their term of engagement, or to have been honorably discharged within the meaning of those terms as used in the act of 1848, when the war was over, or when they were ordered or mustered out of the service. Being in the Army or Navy, their engagement was to serve wherever they were ordered for duty. Their engagement to serve in the war with Mexico ended when they were taken away from that service by proper authority."
2. The doctrine thus announced by the Supreme Court is applicable in the interpretation of the act of January 29, 1887, providing for service pensions for the surviving soldiers and sailors of the war with Mexico.

William B. Johns 393

MEDICAL REFEREE.

OPINIONS OF MEDICAL REFEREE:

Where the question involved in claim for pension requires scientific and expert knowledge, in order to give the evidence therein its just weight, the Department is driven to the necessity of relying, to a great extent, upon the judgment and opinions of the medical referee, and particularly so where such judgment and opinions are based upon a thorough medical examination.

Jacob Schulde (motion for reconsideration) 338

PATHOLOGICAL SEQUENCE—MEDICAL OPINION:

A soldier, having a hospital record showing the existence of a given disease in the service, died, subsequent to his discharge, with a disease apparently different from that described in the aforesaid hospital record; and the medical referee having expressed the opinion that the latter disease was not a pathological sequence of the former, the Department holds that said medical opinion is conclusive against the claim of pension based upon the former cause as alleged in claimant's declaration; and the appeal from the Commissioner is therefore denied.

Jacob Collins (guardian) 381

PENSIONABLE DISABILITY—INCURRENCE:

1. Where there is neither record nor medical evidence to show the existence of the alleged disability in the service, and claimant fails to show the existence after discharge of a pensionable disability which was incurred by reason of the service, the claim should stand rejected. Lay testimony, alone, furnished twenty years subsequent to the alleged incurrence of the alleged disability, can not be accepted as sufficient to establish claimant's declaration.

PENSIONABLE DISABILITY—INCURRENCE—Continued.

2. The Department re-affirms the rule that, "where questions of a purely medical character are involved, it must be governed by its medical advisers, and the opinion of the medical referee in such cases is generally held to be conclusive."

Jeremiah Everlynn 241

SUICIDE—INSANITY—MEDICAL OPINIONS:

Medical examinations of deceased soldier having failed to detect the relation of cause and effect between a gunshot wound for which he was pensioned and the insanity which soldier's widow alleges as the cause of his suicide, the appeal is denied under the settled practice of the Department to be guided by the opinions of its medical advisers in determining questions of a purely medical character.

Margaret, widow of Adam Mayer 203

SOUNDNESS.

PRIOR SOUNDNESS—RESTORATION:

Where a pensioner is dropped from the rolls by reason of statements which were subsequently disproved by a special examination, the pensioner should be restored to the rolls; and it is held that, where a pensioner was dropped from the rolls for alleged unsoundness prior to enlistment, but a medical record appears showing the incurrence in the service of the disability for which pensioned, and, furthermore, a record showing that the soldier performed three years of active service before the development of said disability, he having been accepted as sound at both a first and second enlistment, these facts render the presumption of soundness prior to enlistment equivalent to conclusive evidence of the fact.

William J. Brooks 269

SOUNDNESS AT ENLISTMENT:

The uncertain and conflicting testimony of a single witness, whose memory of events is shown to be untrustworthy, and the impairment of whose mental faculties renders him not only unreliable, but scarcely competent to testify at all, should not be allowed to destroy the presumption of soldier's soundness at enlistment, nor to overthrow the weight of direct and positive evidence of the soldier's freedom from the alleged pensionable disability when he entered the service.

George W. Barnes 301

INSURANCE POLICY—ORIGIN OF DISABILITY:

Where, years subsequent to his discharge from the service, deceased soldier was insured upon his life after careful medical examination, the policy of insurance is accepted as competent and conclusive evidence of soundness at the date of said examination; and the allegation in the widow's declaration, unsustained by either record or medical evidence, that soldier died of *disease of lungs* and of *rheumatism* contracted in and by reason of the service is not sufficient to overcome the presumption that the cause of death was incurred subsequent to discharge, and subsequent, also, to the date of the aforesaid policy of insurance.

Mary E. Livezey (*widow*) 260

LINE OF DUTY.

ALTERCATIONS:

1. The line or performance of military duty must sustain to the alleged casualty or injury the relation of cause, and the alleged disability must be the legitimate sequence of such cause in the service.
2. The fracture of claimant's skull by an enraged comrade in retaliation for an alleged personal offense can not be construed into a legitimate incident of the line of military duty, nor as having any proper relation thereto.

Alexander Gillespie 16

UNDERGOING PENALTY:

Where a soldier was arraigned, tried, and convicted by a court-martial for an offense against the regulations of the Army, and, during the execution of the sentence, whilst in confinement, he contracted typhoid fever and resulting deafness: *Held*, That the resulting disabilities were not incurred in the line of duty. Claimant can not be pensioned for disabilities incurred whilst undergoing a penalty inflicted by reason of his own wrong.

Clarence Wallace 41

NAVY:

1. Any person who may be pensionable in the naval service, and who incurred death or a pensionable disability therein, will be considered as in the line of duty for pensionable purposes, if acting in conformity with the established regulations of the Navy when said death or disability was incurred.
2. Line of duty in the naval service is determined by the established "regulations of the Navy;" and a medical certificate, given by the proper medical officers reporting, in accordance with said "regulations," the cause of death or the origin of the alleged disability as in the line of duty, will be accepted as the best record evidence going to show title to pension.
3. The circumstances determining what constitutes line of duty in the naval service differ from those which fix the line of duty in the Army.

Florence N., widow of Albert T. Cowie 58

UNDERGOING PUNISHMENT:

Where a soldier incurred disease while undergoing punishment for desertion under sentence of a court-martial, it is held that, by reason of the sentence, the soldier was not in line of duty in the sense that conveys a legal right to pension. A soldier can not be pensioned for disability contracted whilst under a penalty inflicted on account of his own wrong doing.

Mary Coburn, widow of Thomas Coburn 80

LINE OF DUTY:

The Department re-affirms the rule in the cases of Ammerman, William M. (P. D., Vol. 1, p. 5); Friel, James E. (P. D., Vol. 1, p. 329); of Gillespie, Alex. (P. D., Vol. 2, p. 16); and Stilwell, Jesse M. (P. D., Vol. 2, p. 83), etc., defining the line of duty in the service.

Stephen G. Chase 345

LINE OF DUTY—CONTRIBUTORY NEGLIGENCE:

Where a disability, pensionable in degree, is incurred in the service, the contributory negligence on part of the soldier which should be shown, in order to take the case out of the line of duty, must be of such character as is recognized as *gross* negligence, which is defined to be "the want of that care which every man of common sense, however inattentive, takes of his own property or person." [1 Chitty on Contracts, p. 662.]

Chalkley, alias T. C. Milbourn 350

PERSONAL ASSAULT:

A personal assault by one comrade upon another in the service is neither a legitimate nor a necessary incident of the line of duty; and the fact that claimant did not sustain a culpable relation to the assault does not strengthen, much less establish, his claim for pension on account of *injury* resulting from it. The question involved in such claim is not whether *claimant* was to *blame* for the act of his assailant, but whether the act itself was a necessary, or even a reasonable, incident of the service.

Jesse M. Stilwell..... 83

JURISDICTION OF COMMISSIONER:

1. When a claim for pension has been adjudicated upon appeal to the Secretary of the Interior, the Commissioner of Pensions can not on his own motion reopen, review, nor reverse the said adjudication, and, in doing so, his action will be held to be "a mistaken exercise of jurisdiction."
2. A decision of the Department upon an appeal in a pension claim must stand as the conclusive judgment in said claim, or else the supervisory control given by law to the Secretary of the Department of the Interior would become a nullity and the claimant's right of appeal from the Commissioner of Pensions would be merely nominal.
3. The Department re-affirms the rule in Ammerman, William (vol. 1, p. 5, P. D.), that "the cause of disability or of death giving title to pension must, in some manner, pertain to and have a natural and logical connection with the military service and to line of duty in said service."

Zenas Hamilton..... 217

INJURIES:

Injuries alleged by claimant must sustain a natural and logical relation to the military service in order to be properly ascribed to the line of duty, and the question of personal responsibility or guiltiness for the incurrence of said injuries does not enter into such a claim for pension.

James Harding..... 232

DISABILITIES, SPECIFIC.

SPECIFIC DISABILITIES—ARREARS—INCREASE—RE-RATING:

The Department construes and applies—

1. The act of February 28, 1877;
2. The act of June 16, 1880;
3. Section 4698½, Revised Statutes of the United States—the aforesaid acts and section having reference to pensions, for specific disabilities, arrears, increase, and to re-rating of pensions.

Oscar Dunlap..... 291

INCREASE—DOUBLE SPECIFIC DISABILITIES:

Where soldier applies for increase of pension under and by reason of the act of February 28, 1877, which provides that "all persons who, while in the military or naval service of the United States and in the line of duty, shall have lost one hand *and* one foot or been totally and permanently disabled in both shall be entitled to a pension for *each* of such disabilities and at such rate as is provided for by the provisions of *existing laws* for *each* disability," the Department holds that the term "existing laws" should be construed as *limited* to the laws existing at the date of the passage of said act, and not as embracing "all laws which might thereafter be called into existence."

Charles Lovely..... 288

STATUTORY DEFINITIONS.

RERATING—ACT OF JUNE 18, 1874:

1. The Department holds that, applying certain fundamental rules of construction, the words "total and permanent helplessness," used in the act of June 18, 1874, should be taken to mean such *incapacity for self-help* as would prevent the person in that condition from exercising any of the ordinary and necessary functions of daily life, such as walking, sitting, rising, dressing, eating, etc.; and this condition should exist without material change or alteration. This condition is defined by Congress as "requiring the regular aid and attendance of another person."
2. The settled practice of the Department is to be guided in the determination of this and all questions purely medical by the opinions of its medical advisers and to accept as generally conclusive the opinions of the medical referee when based upon the results of medical examinations.

Edward Posson 36

CIVILIAN EMPLOYÉS—NON-PENSIONABLE:

The act of January 29, 1887, granting pensions to the soldiers and sailors of the Mexican war, provides a service pension for only the surviving officers and enlisted men of that war; and where the claimant was not an enlisted man, but only a civilian employé of the Quartermaster's Department, serving in the capacity of a teamster, the provisions of said act are not appplicable.

John F. Dissman (late teamster) 19

PURSERS' CLERKS—NAVAL OFFICERS:

1. A purser's clerk is an officer of the Navy, in the contemplation of the provisions of the act of January 29, 1887. While he was not an officer in the constitutional sense, as defined by the Supreme Court in the case of the United States *vs.* Germaine (99 U. S., 508), unless he was appointed by the Secretary of the Navy as the head of a Department, yet, it was the evident intention of Congress to use the word "officer" in a less strict sense in laws granting three months' extra pay and bounty-land warrants to officers and enlisted men in the Army and Navy in the Mexican war; and the word "officer" in the act under consideration should be held to apply to those whose rank was recognized in the service by the rules, regulations, and customs in vogue at the time the service was done.
2. The decision in the case of Berkely Ward, late a captain's clerk on board the United States ship *Mississippi* (No. 10592), rendered by the Department July 2, 1888, is overruled.

Richard H. Sinton 320

PAYMASTERS' CLERKS—ACT OF JANUARY 29, 1887:

The act of January 29, 1887, provides pensions for surviving "officers" and "enlisted men" only of the Army in the war with Mexico, and, inasmuch as the clerk of a paymaster in the Army is not an "enlisted" man, he can not become a beneficiary of said act.

John H. Cassin (reconsideration) 376

LEGAL TERMINATION—RESTORATION:

1. The words "legally terminated," as used in section 4719, Revised Statutes, having reference to a grant of pension, do not mean that the pensioner is not entitled to a pension, but the termination of the right to receive the same by reason of non-claim, and therefore the termination of the right to have his name on the list of pensioners. The context of the statute assumes that a pension was granted, that the pensioner had a right to draw it, but, as he has not drawn it for a period of three years, it presumes that it is "legally *terminated*" by reason of certain assumed facts transpiring since the pension *was granted*.

LEGAL TERMINATION—RESTORATION—Continued.

2. Where a continuing right of this nature is taken away by statutory provision, designed to guard the Treasury against a future demand in the name of a person who is assumed to be dead, or to be remarried, or to have recovered from the disability, and the same statute provides for a restoration, the application therefor must be determined by compliance with the conditions on which the statute itself allows the restoration.

Patrick Welch, alias Patrick Connally 328

DUE ENLISTMENT—MEXICAN WAR:

The act of January 29, 1887, granting service pensions to the "surviving officers and enlisted men" of the war with Mexico, distinctly states and explicitly requires that those claiming its benefits must have been duly enlisted in and honorably discharged from the service in said war; and the expression, "duly enlisted," is held to mean a regular legal enlistment, such as is authorized by military rule and precedent.

Florida, widow of Pierre M. Kinnerly 265

VETERAN FURLOUGH—SECTION 4700:

The language of section 4700, Revised Statutes, United States, viz, "with the organization to which they belong," relating to soldiers upon veteran furlough, should be held to mean such soldiers while with their commands when leaving for or returning from veteran furlough, and not when separated and absent at their homes. This construction is based upon the nature of said furlough, upon the peculiar regulations governing it, and upon the evident intent of Congress.

Lawrence H. Rousseau (reconsideration of appeal) 151

DEATH CAUSE.

DEATH CAUSE—CORRECTION OF RECORD:

The War Department corrected the entry of "death from delirium tremens," upon the evidence presented; but the fuller testimony, brought out by several special examinations, renders it more probable that claimant's death was due to delirium tremens than to any cause relied upon by the claimant; and delirium tremens is accepted as the cause of soldier's death.

Delila, widow of Henry Hennick 49

DEATH CAUSE—WIDOW'S CLAIM:

Where the immediate cause of a soldier's death is in doubt and becomes the subject of medical investigation, the formally expressed opinion of the medical referee of the Bureau of Pensions will, in pursuance of a settled practice, be generally accepted by the Department as conclusive of the question.

Emma E., widow of Daniel L. Sprong 107

DEATH CAUSE—ALTERCATIONS:

An injury, incurred in a scuffle with a comrade in barracks and causing soldier's death, does not give title to pension, inasmuch as said injury is not due to the line of duty. The Department re-affirms the doctrine that "the cause of disability or of death must in some manner pertain to and have a natural and logical connection with the military service and line of duty in said service," and disabilities originating in personal altercations sustain no such connection.

Mary A., widow of Stephen Compton 199

DEATH CAUSE—IMMEDIATE AND REMOTE:

1. The claimant being a dependent mother, it is held that "the death of her son must have been the natural, direct, or proximate result of his disease contracted in the service." In law the immediate, and not the remote, cause of any event is regarded.
2. The ruling in the case of Alice E. Travers (vol. 1, Pension Decisions, p. 110) re-affirmed, viz, that "where the death of the soldier, upon whose account the pension is claimed, was caused by an overdose of a narcotic or other poison, which had been prescribed originally by a physician to alleviate pain caused by either disease contracted or wound received in the United States service, or taken upon the soldier's own responsibility through mistake and with no suicidal intent, such death cause can not be accepted as a competent basis for claim."

Sarah A., mother of John G. Stack 153

SECONDARY DEATH CAUSE:

The Department adheres to and re-affirms the rule laid down in the case of Mensing, Henry (vol. 1, Pension Decisions, p. 336), wherein it was *held*, that, "to establish secondary or contributory cause of disability or of death, the claimant, before becoming entitled to pension therefor, must prove that the accident resulting in said disability or death was directly caused by the previously incurred pensionable disability, and was not the result of any negligence, carelessness, or risk on part of the soldier, or of a neglect of that due care and caution which ordinary prudence would dictate should be exercised by one in either a diseased or a crippled condition."

Eliza, widow of William Fairfield 158

INCURRENCE AND DEATH CAUSE:

Where the evidence to establish the incurrence of an alleged disability in the service is not only unsatisfactory in itself, but unsupported by either record or medical evidence, such as required by the rules of the Department, it can not be accepted as sufficient to prove the incurrence as alleged. Lay testimony, lacking the quality of personal knowledge, and given years subsequent to soldier's discharge, must be corroborated by a record made contemporaneously with the origin of the alleged disability in the line of duty.

Annie M., widow of Henry H. Waters 227

INSANITY—PRIMARY CAUSE OF DEATH:

Where insanity is alleged as the primary cause of soldier's death from suicide, there must appear a medical record, or other direct and satisfactory testimony, connecting the origin of the alleged disability with the military service. The necessity for such evidence is strengthened by the fact that the soldier did military duty subsequent to the alleged origin of his disability, but without a hospital record of the same.

Ann, widow of Philip Daniel Gallagher 332

SECONDARY CAUSES:

The Department holds that when a person, disabled by injury received or disease contracted in the line of military duty, voluntarily places himself in a position particularly subject to risk and where such injury or disease increases the liability to accident, he must be regarded as assuming in a great measure the risk, so that accidents happening to him under such circumstances have such a remote and uncertain connection with the service, as a consequence, that neither disability nor death, resulting from them, comes within the pension law.

Mary E., widow of George W. Lewis 334

DISABILITIES.

ORIGIN OF DISABILITY—VETERAN FURLOUGH:

1. A disease or other disability is not considered as in line of duty if incurred by a soldier on veteran furlough, unless the soldier was under orders and with the organization to which he belonged.
2. A disability resulting from impure vaccination incurred voluntarily by claimant, whilst absent from his command on veteran furlough, and under treatment of a lay surgeon, held to be not due to the service and, therefore, not pensionable.

Lawrence H. Rousseau 6

DISABILITY SUBSEQUENT TO DISCHARGE:

Where there is an obvious cause existing subsequent to discharge, sufficient to show the origin of claimant's alleged disability, but no competent and reliable testimony, lay nor medical, to establish the origin of same in the service, the presumption will be maintained that said disability was due not to the service, but to the cause originating after claimant's discharge.

George W. Saunders 11

TOTAL—ACT OF AUGUST 4, 1886:

In order that claimant may be entitled to $36 per month under the act of August 4, 1886, he must show that, by reason of his disability, he is totally disabled in either his leg or his arm, the provisions of the act being restricted to the *total disability* of one or both of those members.

Charles W. Struble 14

CERTIFICATE OF DISABILITY:

1. The record made of treatment in hospital during service is presumed to be correct as showing all the diseases and all the treatment which claimant had during his army service, and it is presumed furthermore that he was not treated for any disease other than that stated; and these presumptions will obtain until the contrary is established by competent evidence.
2. A contemporaneous record can not be overthrown by the affidavit of a surgeon, made from memory more than twenty years subsequent; and especially will such be the case where the certificate of disability is corroborated by the utter silence as to the disease in question, or any treatment therefor, in the hospital record.

Adam Cutts 26

LEGAL DISABILITIES OF PENSIONERS:

Interpretation of section 4766, *Revised Statutes, as amended in* 1882, 22 *Stats.*, 373.

1. The domestic status of citizens and inhabitants of the several States is not committed to the Federal Government, but is the subject exclusively of State law and of the judicial administration of State courts. Legal disabilities are, therefore, such as are declared by or in pursuance of State law.
2. The decree of the court establishing the legal disabilities of the pensioner and appointing a conservator of his person and property in no manner assumes to direct the disposal of his pension, nor to seize it to his own deprivation. No State court possesses such power. It is by virtue of the statute of the United States only that, when the condition of legal disability is established and a guardian appointed by the State court, the pension may be paid to such guardian; but payment of pension to the guardian in that case is no more in obedience to process of law *when the disability results from habitual drunkenness*, the infirmity of age, or from other cause provided by law, than when it is adjudged for insanity, for imprisonment, for crime, or for minority.

By Secretary Vilas 94

TOTAL—SECOND GRADE:

1. There being no intermediate rating provided by the act of August 4, 1886, it is held that said act virtually repealed or extinguished the rate of $24 per month for total disability, as described by the act of March 3, 1883, and thereby the third-grade rating, under the latter act, became the second-grade by operation of the act of August 4, 1886.
2. The Department construes and applies, as bearing upon this point, the following provision of the act of August 4, 1886, viz: "That from and after the passage of this act all persons on the pension rolls and all persons hereafter granted a pension, who, while in the military or naval service of the United States and in the line of duty, shall have lost one hand, or one foot, or been totally disabled in the same, shall receive a pension of $30 a month."

John R. Weddle 97

EQUIVALENT DISABILITIES:

Where a claimant is pensioned at $24 per month under the "equivalent" clause in the act approved March 3, 1883, he is not entitled to the increase of $30 per month as provided by the act of August 4, 1886, inasmuch as the act of August 4, 1886, merely substitutes the rate of $30 per month for the loss of or total disability in hand or in foot for the $24 rate provided by the act of March 3, 1883; but it does not provide a rating for *equivalent* disabilities, leaving, as it does, that portion of the act of March 3, 1883, to stand without modification.

Joseph Becker 109

IMPROBABLE ORIGIN OF DISABILITIES:

Where a claimant, without proof, ascribes his alleged disabilities to unreasonable and improbable causes, and there appears in the evidence a reasonable cause for said disabilities, but wholly disconnected with the military service, the Department holds that the improbable causes, being unsusceptible of proof, should be denied, and the rejection of the claim affirmed as being not only devoid of merit, but intentionally fraudulent.

Richard Milliner 112

DISABILITY SINCE DISCHARGE:

Proof of the incurrence of a disability in the service and line of duty is not alone sufficient to entitle a claimant to pension, but the alleged disability must have existed in a *pensionable* degree, and such degree must be established by medical and other competent evidence as existing also since the date of claimant's discharge.

Leonhart Miller 142

PENSIONABLE DISABILITY—INCURRENCE:

1. The Department re-affirms the ruling in the case of Lemuel R. Scott, that "a disability or injury, to be pensionable, must be of such a character and exist to such a degree that it can be detected by the examining surgeons or board of surgeons of the Pension Office." (Vol. 1, P. D., p. 77.)
2. The certificates of examining surgeons can not be set aside nor controverted by the testimony of either family physicians or neighbors, especially where such certificates were made by a board of surgeons, based upon a careful examination of the party in interest. (W. L. D. O'Grady, 1 P. D., p. 222.)
3. It is also held that "where there is no record nor medical evidence of the incurrence of the alleged disease in the service and line of duty, and a pensionable degree of disability is not shown to have existed since filing of claim, the application for pension should be denied." (Vol. 1, P. D., p. 228.)

John Blair 183

ORIGIN OF DISABILITY—SECOND ENLISTMENT:

Where claimant alleges, as basis for pension, the incurrence of a disability in his first service, and it appears that he re-enlisted and served without a record of any disability, the second service raises the presumption that no pensionable degree of disability was incurred in his first service, and such presumption is rendered conclusive by the absence of all testimony showing a pensionable disability at discharge.

Everett Cawood 197

ORIGIN OF DISABILITY—SEQUENTIAL DEATH-CAUSE:

1. The certificate of disability for discharge of soldier, being a contemporaneous official record, is presumably correct as setting forth the entire cause of soldier's disability at the time; and where the disease causing death is neither mentioned nor indicated in the certificate, that fact will afford a strong legal presumption that said disease did not exist in a pensionable degree, if at all, either in the service or at discharge.
2. Lay testimony, taken years after soldier's death, can not be accepted as establishing the facts alleged, unless supported by the record or by direct medical evidence.
3. To entitle a widow to pension, the soldier's death must have been the natural, direct, or proximate result of wounds, of injuries, or of disease incurred in the line of duty; and, if the immediate death-cause arising after discharge be alleged as the result of a disease contracted in the service, the one must be proved to have been so ingrafted upon the other as to render the two inseparable as the sequential cause of death.

Mary, widow of Stedman B. Farrar 199

ORIGIN OF DISABILITIES:

Where claimant's own statements as to the origin of his alleged disabilities are conflicting and contradictory, and a special investigation fails to show that said disabilities either originated in the line of duty or were due to the service, the claim for pension should be rejected for lack of evidence to sustain it.

William O. McMurphy 246

REGULAR AID AND ATTENDANCE:

Claimant having appealed for the rating of $50 per month, the Department holds that said rating is provided for those pensioners only who, because of permanent and total helplessness, require the regular aid and attendance of another person; and, in the absence of proof showing claimant to be in such a condition, the appeal is denied.

John Costello 84

MISTAKEN CAUSE OF:

Where claimant alleges one disease as the cause of his disability, but the result of careful medical examinations shows an entirely different cause, the reports of said medical examinations will be accepted as correct, and the claim for pension will be adjudicated in accordance with the facts thus ascertained by the medical advisers of the Department, the claimant's allegation being construed as a mistake.

William H. Scott 43

ACT OF AUGUST 4, 1886:

In order to be entitled to $45 per month, under the act approved August 4, 1886, claimant must have lost either an arm at the shoulder joint or a leg at the hip joint, or so near the joint as to prevent the use of an artificial limb; nor has the Department any discretionary power to modify the specific requirement of the law. A literal compliance with the act is evidently necessary on the part alike of the claimant and of the Department.

John Adams 83

ACT OF AUGUST 4, 1886:

The act of August 4, 1886, makes no provision for equivalent disabilities, but provides pension for only total disability of a hand, of a foot, of an arm, or of a leg, and such specific disability must be shown in order to entitle claimant to the benefits of the act.

Charles A. Beckert 224

DEPENDENCE.

DEPENDENT MOTHER—ADEQUATE SUPPORT:

Where the evidence shows that, at the date of deceased soldier's enlistment, at the time of his death, and subsequently, the mother was provided with an adequate support, first by her husband's estate and then by reason of a lifetime contract for maintenance by her surviving son or sons as a condition in the purchase of the aforesaid estate, it is held that the mother is not dependent in the sense that would entitle her to a dependent mother's pension under the law.

Sarah, mother of James E. Cushman (deceased) 166

DEPENDENT FATHER:

1. In order to entitle the appellant to pension as a dependent father, it must be shown that, at the date of soldier's death, appellant had "no other adequate means of support than the contributions of his son, or of any other person not legally bound to aid in his support, and that he was unable to derive from his own actual or possible manual labor sufficient income" for an adequate support.
2. A pension granted to a dependent father can not be paid except during such period as the evidence shows it to be actually necessary for adequate subsistence.

David Rees 307

PENSIONABLE DEPENDENCE:

No pension can be granted to an alleged dependent parent under section 4707, Revised Statutes of the United States, upon the basis of any probable or contingent condition of dependence or of destitution which might happen to said parent after soldier's death; but said condition must be shown to exist as a matter of fact at the time of soldier's death, and to the extent required by the statute.

Aaron Hyer 237

MOTHER'S DEPENDENCE:

The conditions essential to constitute a mother's pensionable dependence are defined by section 4707 of the Revised Statutes, which provides: "That a mother shall be assumed to have been dependent upon her son within the meaning of this section if, at the date of his death, she had no other adequate means of support than the ordinary proceeds of her own manual labor and the contributions of said son, or of any other person not legally bound to aid in her support," etc.

Anna P., mother of Abram Switz 342

DEPENDENT FATHER'S CLAIM:

Where, in the case of a father's claim for pension on the ground of dependence upon deceased soldier, it appears that claimant was disabled at the time of the son's death, and was thereby rendered actually dependent upon the son, in the adjudication of the claim it is irrelevant and immaterial what caused claimant's physical disability, or whether it was or was not the result of his own vicious habits. The law makes no discrimination, and the Department is not authorized to interpolate a disqualification which the law (section 4707, Revised Statutes) does not impose.

Patrick O'Hare 370

DEPENDENCE—FATHER:

The Department holds that, in order to establish proof of a father's dependence, in a pensionable degree, upon a deceased soldier, "it must be shown that, at the date of the death of the soldier, the father had no other adequate means of support than the contributions of his son, or of any other person not legally bound to aid in his support, and that he was unable to derive from his own actual or possible manual labor sufficient income to furnish him means of adequate support; and, furthermore, such pension, even if granted, can not be paid except during such period as the evidence may show it to be actually necessary as a means of adequate subsistence." (Section 4707, Revised Statutes of the United States.)

Louis Darrean 372

DEPENDENT MOTHER:

Dependence, in the sense of requiring assistance or contributions from deceased soldier, at the time of his death, and as necessary to afford her adequate means of subsistence, is an absolute prerequisite to constitute a dependent mother in the meaning of the pension laws.

Margarcta, mother of Charles Niher 374

EVIDENCE.

SUFFICIENCY OF HOSPITAL RECORD:

The hospital record, made during service, is presumed to be correct, as showing all the diseases or disabilities and likewise all the treatment which claimant had during the service; and where claimant, years after his discharge, alleges a disease or a disability of which his hospital record contains no mention, and of which also there was no evidence apparent at discharge, the presumption is that said disease or disability was not incurred in the service, but subsequently to his discharge, and it is not, therefore, pensionable.

Leri Connor 1

PROOF OF ORIGIN:

1. Where claimant's statements are the only direct verbal evidence showing the origin of alleged disabilities in the service and line of duty, they can not be accepted to establish incurrence unless corroborated and sustained by all the circumstances in entire accordance with the statements of the record.
2. A certificate of disability whereupon a soldier was discharged is held to contain a description of all the disabilities with which the soldier was suffering in the service and which rendered him unfit for duty at the time it was issued; and this presumption will obtain until overthrown by positive, direct, and conclusive evidence.

Edwin H. Bouton 23

PRESUMPTIVE EVIDENCE:

Where it appears more probable from the evidence that claimant's disability originated from causes to which he was necessarily exposed while in the line of duty than from causes having no necessary connection with the service, it is held that the disability alleged was due to the former causes. Upon this point the presumption, in the absence of evidence to the contrary, must incline toward the claimant.

David A. Sawyers 70

PRESUMPTIVE EVIDENCE:

Upon a reconsideration of the evidence supporting the claim of Cyphert P. Gillett, the Department adheres to and re-affirms the decision of the case as made September 17, 1887, and reported in vol. 1, P. D., p. 270.

Cyphert P. Gillett (motion for reconsideration denied) 74

EVIDENCE OF ORIGIN:

1. The Department re-affirms the rule that "lay testimony, when unsupported by the record or by direct medical evidence, and which is dated years after claimant's discharge, can not be accepted as proof of the incurrence of the alleged disability in the service."
2. The Department holds that where there is a hospital record in the service such record raises the presumption that it contains all the diseases and all the treatment which the soldier had during his army service; and that presumption will be maintained until the contrary be clearly established by competent evidence.

Arad P. Brown 88

PATHOLOGICAL SEQUENCES—MEDICAL TESTIMONY:

The Department holds that in determining the cause of a soldier's death from disease the opinion of the medical referee, defining the pathological relation of said disease to the *origin* of soldier's pensionable disability in the service, is generally conclusive "in the absence of evidence showing a mistake or error upon his part."

Mary F., widow of George F. Spilman 133

LAY TESTIMONY—READJUDICATION:

1. Claimant seeking restoration of pension the Department holds that lay testimony, dated years after discharge from the service, and unsupported by record or direct medical evidence showing the existence of the alleged disability—there being no hospital record—can not be accepted as proof of incurrence of said disability in the line of duty.
2. Cases long since adjudicated by previous administrations will not be reconsidered upon the mere allegation that proper weight was not given to the testimony in the original adjudication of the same.

James Scanlan 148

PRESUMPTIVE EVIDENCE—PATHOLOGICAL SEQUENCE:

1. The evidence showing that prior to and at the date of enlistment claimant was free from the alleged disability, but that at the date of discharge and subsequently the disability existed in a pensionable degree and so continued to the time of filing declaration for pension, the presumption that the alleged disability originated in and was due to the service becomes conclusive.
2. Disease of eyes being ascribed, as a result, to small-pox incurred in the service and treated in hospital as shown by record, it is *held* that "it being shown that claimant's eyes were good prior to the attack of small-pox, but that subsequently his sight began to fail, and continuance being shown, the disease of eyes can be accepted" as a probable pathological result of the small-pox of record, and pension therefor allowed.

Daniel M. Redding 167

INCURRENCE—RERATING:

1. Lay testimony, when unsupported by record, or by direct medical evidence, and when dated years after claimant's discharge, there being no hospital record of the disability in the service, can not be accepted as proof of incurrence of the alleged disability in the service.
2. Where there is a hospital record contemporaneous with the alleged injury, such record raises the presumption that it contains a record of all the disabilities for which soldier was treated, and such presumption can be overcome only by clear and convincing evidence.
3. Where a case was long since adjudicated and by a previous administration, the same will not be reconsidered nor re-adjudicated upon the mere allegation that proper weight was not given to the testimony in the original adjudication.

Isaac Sell 17

AFFIDAVIT—HOSPITAL RECORD—SECOND ENLISTMENT:

1. Claimant's affidavit as to incurrence of disability must be sustained and corroborated by the surrounding circumstances, and be entirely consonant with the record in his case, if unsupported by other evidence.
2. The hospital record, made during service, is presumably correct as showing all diseases or disabilities, as well as the medical treatment which claimant had in the service; and where, years after his discharge, claimant alleges a disease or disability of which the hospital record contains no mention, and of which there was no evidence at discharge, the presumption is that said disability was not incurred in the service.
3. A second enlistment raises the presumption that claimant had recovered from whatever pensionable disease or disability he may have contracted in his first service.

Fritz Mueller 192

RECORD OF ORIGIN—LAY TESTIMONY:

Where no record nor medical evidence appears to show the existence of the alleged disability in the service, and claimant fails to prove since discharge the pensionable degree of any disability due to the service, the claim should be rejected, lay testimony alone being insufficient to support claimant's declaration as to the alleged incurrence in the line of duty.

Albert Worthley 212

LAY TESTIMONY—HOSPITAL RECORD—CERTIFICATE OF DISABILITY:

1. The Department re-affirms the ruling in the cases of Andrew J. McIntire, John W. Dodge, Frantz Fallady, Arad P. Brown (vol. 1, P. D.), and Annie M. Walters (vol. 2, P. D.) to the effect that lay testimony which is produced years after soldier's discharge can not be accepted as proof of incurrence of the alleged disability, when unsupported by either record or medical evidence.
2. It is presumed that the hospital record and the certificate of disability state all the material facts relating to the alleged disease or wounds or other disability.
3. The Department adheres to the rule in William M. Bradshaw (vol. 1, p. 239, P. D.), wherein it was held that "when an officer applies for and receives a certificate of disability to accompany his resignation, and forwards the same with his letter of resignation, his act of transmitting the certificate to his commanding officer raises the presumption that the facts therein stated are by him admitted to be correct; and, having availed himself of the benefits derived from the statements contained in the certificate, he is estopped from denying their correctness, many years afterwards, except upon testimony of the most positive and conclusive character."

Henry W. Carpenter 230

CAUSE AND EFFECT—CIRCUMSTANTIAL EVIDENCE:

1. Death cause, to be pensionable, must be traced, whether immediately or remotely, to a wound or injury received or to a disease contracted in the line of duty, and this relation of cause and effect, established in accordance with the rules of probability, must exist in the sense that the alleged cause was the thing or the condition without which the result—*i. e.*, death—would not have occurred.
2. The Department re-affirms the ruling in the case of Robert G. Mosby, guardian, decided September 12, 1888, to the effect that "neither the law nor the rules of the Department require the fact of cause and effect to be proved beyond a reasonable doubt," inasmuch as that would exact "a degree of accuracy not warranted in a due enforcement of the law." Circumstantial evidence strong *enough* to produce a moral conviction is sufficient to establish the fact.

Ruth L., widow of Francis O. Miller 214

NEW EVIDENCE—RECONSIDERATION:

The ruling re-affirmed, viz, that, "after a claim has been rejected by the Commissioner of Pensions, and on appeal decided adversely by the Department, a reconsideration of the same upon a second appeal to the Department is justified upon the ground only that in the former decision a manifest error was committed, or that new, material, and important evidence, such as would have warranted a favorable decision in the first instance, is produced by claimant—new, material, and imporant evidence, which, as it may appear, claimant had failed to procure, even at the expense of proper diligence."

Robert Hirsch 304

TOTAL BLINDNESS—ORAL EVIDENCE OF ORIGIN:

In a claim of pension for "total blindness," the continuous service of claimant for about twenty months being established, there being no evidence of disease of eyes nor of impaired vision prior to or at enlistment, the claimant's captain and several of his comrades testifying orally, from personal knowledge of the incurrence, alleging a specific cause, and the continuous existence of said disease in the service; competent witnesses also testifying from personal knowledge, in connection with medical treatment, to the continuance of the disease at and for years subsequent to discharge, and to the culmination of the same in total blindness: it is *held* that such oral evidence is ample to prove the origin and the nature of claimant's disability, in the absence of all record evidence in the service, and it will be accepted as establishing claimant's declaration, any merely theoretical cause, if alleged to defeat the claim, being regarded as not only speculative, but as an insufficient rebuttal of the obvious facts in the case.

James Edwards (colored) 136

INCURRENCE—LAY TESTIMONY:

Where there is no record nor medical evidence to sustain the claim, showing the incurrence of an alleged disability in the service and in line of duty, and where claimant has delayed more than sixteen years to file declaration for pension, the evidence necessary to justify the Department in reversing the action of the Commissioner of Pensions in rejecting the claim should be both strong and conclusive. The Department re-affirms the rule that "lay testimony when unsupported in a case like this by the record or by medical evidence, and which is dated years after claimant's discharge, can not be accepted as proof of the incurrence of the alleged disability in the service."

Levi Reeves 177

PRESUMPTIVE EVIDENCE—RECORD EVIDENCE:

1. Where there is a hospital record showing the incurrence, existence, and treatment of a pensionable injury in the service, the origin of which, in the line of duty, is claimed by soldier, there being no evidence adverse to such claim, the presumption is that said injury was incurred in the line of duty, as alleged, and as indicated by the hospital record.
2. The rule is re-affirmed that "the record made of treatment in hospital during service is presumed to be correct, as showing all the diseases and all the treatment which claimant had during army service; and it is further to be presumed that he was not treated for any disease other than that therein stated; and these presumptions will obtain until the contrary is clearly and satisfactorily established by competent evidence."

Henry Smith 358

LAY TESTIMONY—"NEW" DISABILITIES:

1. The Department re-affirms the ruling that "lay testimony, filed many years subsequent to the alleged incurrence of a disability, when unsupported by either *the record or* medical evidence is not deemed sufficient to prove incurrence" *in the service* and line of duty.

LAY TESTIMONY—"NEW" DISABILITIES—Continued.

2. The failure to allege in the original declaration certain "new disabilities" as the basis of pension raises the strong legal presumption that they did not exist at the date of said original declaration, and that they are not due to the line of duty in the service.

Paul Pfau 373

PROOF OF INCURRENCE:

The unsupported allegations or statements of a claimant, as to the incurrence of an alleged injury in line of duty, can not be admitted as sufficient to establish that fact, unless said allegations or statements are fully corroborated by the surrounding circumstances.

Edgar Shroeders 353

ORIGIN OF DISABILITY—LAY TESTIMONY:

1. Alleged disabilities, the existence of which can not be shown at the date of soldier's discharge, and the continuance of which is not proved for years subsequent thereto, are not accepted as pensionable on account of origin in the service.
2. A disability of which there is no record either in the service or at discharge can not be proved to be due to the service by lay testimony furnished over twenty years subsequent to the alleged incurrence of the same.

Henry Helman 314

ORIGIN IN THE SERVICE:

1. An allegation of claimant as to the origin of a disability in the service and line of duty must be sustained by more than merely presumptive evidence. A corroborating record, or direct testimony, based upon the personal knowledge of witnesses, must be presented to support said allegation.
2. Where a disability is alleged to have been incurred in the first of two terms of service, the second enlistment operates as an estoppel to claim of pension for the alleged disability.

Michael Cassidy 379

INSUFFICIENCY OF EVIDENCE:

Disabilities which are pensionable in degree, and which are specifically alleged as the basis of a claim, must be proved to have originated in the service and line of duty; and if, in the absence of such proof, it appear that a searching and careful investigation, extending over a number of years, has failed to establish the existence, at discharge, or the continuance thereafter, of said disabilities, the claim should stand rejected for insufficiency of evidence.

William Waterbury 35

"SPECIAL" AND "GENERAL" ACTS.

SPECIAL AND GENERAL LAWS—PENSION IN LIEU:

1. When a claimant seeks relief at the hands of Congress, he thereby virtually agrees to abide by the action of that body in determining the merits of his claim for pension; and he agrees, furthermore, that, in case he be granted a pension, the payment of the same shall begin at the date of the passage and approval of the special act, unless the act itself specifically designates some other date; and, in the absence of such designation, claimant will not only have no right to arrears, but be cut off from all claim to arrears, or to any additional sum of money of whatever character, other than or in addition to *that expressly* provided for in such special act. (Alvin Walker, vol. 1, P. D., *p. 143.*)

SPECIAL AND GENERAL LAWS—PENSION IN LIEU—Continued.

2. If a claim for pension, having been granted by special act, "be reconsidered by the Commissioner, justice to the Government would require that it be done *ab initio*, in total disregard of the special act" granting the pension, and "in absolute freedom from any condition or promise."

Peter Adams 46

PENSIONS UNDER SPECIAL ACTS:

The Department adheres to the ruling in the case of Edwin R. Tucker, of February 6, 1886 (P. D., vol. 1, p. 1), wherein Assistant Secretary Jenks held that "the effect of a special act granting a pension is to cut off the pensioner from all claim to arrears or to any other additional sum of money of whatsoever character other than or in addition to that expressly provided for in such special act," and, also, that, "when the law-making power has, by a special act, granted a pension to a particular person, the presumption is that the act measures the *full* bounty intended to be conferred by way of pension, and that no additional amount whatever shall be granted under the general law, unless provided for by the special act."

Peter J. Cratzer 104

BEGINNING OF PENSION—SPECIAL ACT:

1. The Department re-affirms the ruling in the case of Alvin Walker (Pension Decisions, vol. 1, p. 143) to the effect that "in cases where claimants obtain relief through a special act of Congress, the Commissioner has no discretion and is required to begin the payment of the pension at the date of the passage and approval of said act, unless the act itself shall specify some other date by which the Commissioner shall be guided."
2. The genius of our institutions and the policy of our laws tend to limit, so far as it can conveniently be done, all discretion on the part of executive officers in drawing money from the public Treasury; and when the law-making power has, by a special act, granted a pension to a particular person, the presumption is that the act measures the full bounty intended to be conferred on that person by way of pension and that no additional amount whatever should be granted him under the general laws, unless expressly provided for under and by special act. (Edwin E. Tucker, P. D., vol. 1, p. 1.)

Rebecca, widow of John E. Allen 262

SPECIAL ACTS—NEW DISABILITY:

1. Where a claimant applies to Congress for a special act allowing him pension, and the same is granted "in lieu of all other pensions," the Secretary of the Interior, as well as the Commissioner of Pensions thereby loses jurisdiction of the case; and, if the aforesaid special act contain error, or fail, in claimant's judgment, to embrace all or fully the disabilities for which he seeks pension, "claimant's only relief must be obtained from Congress," and not through the Bureau of Pensions under the general laws, inasmuch as his sole right to pension exists by virtue of the aforesaid special act, which Congress only can either alter or amend.
2. A "new" disability means a disability disconnected from the disability for which pension was originally allowed. It refers to a disability the origin of which, in the service and line of duty, must be proved in the same manner as if it alone were the subject of the claim.

Newton C. Ridenhour 348

RESTORATION—SPECIAL ACTS:

Where a claimant is restored to the pension-rolls by a special act of Congress wherein the rate, the commencement, and the duration of the pension are expressly fixed, the same can not be varied by the provisions of the general pension law, and the pensioner can not be paid for any time anterior to that specified for such payment by the special act, nor can he obtain relief under the general law, unless he be relegated to the status that he formerly occupied as a claimant by the repeal of the said special act, and shall thereupon make his application for pension in the ordinary way.

Lachlan L. McIntosh..... 336

SERVICE PENSIONS.

WAR OF 1812:

Inasmuch as the statute which confers service pensions upon veterans of the war of 1812 expressly requires proof of service of at least *fourteen days'* duration, it must be definitely shown by claimants under said statute not only that they rendered service in said war, but that their service embraced not less than fourteen successive days. Failure to establish by competent evidence the requisite length of service is held to be fatal to a claimant's title.

Ezra D. Hatfield..... 155

WAR WITH MEXICO;

1. The failure or inability of a claimant under the act of January 29, 1887, to show that, being duly enlisted, he "actually served sixty days with the Army or Navy of the United States in Mexico, or on the coast, or frontier thereof, or en route thereto in the war with that nation," is fatal to his claim for service pension under the aforesaid act.
2. The fact that a claimant received a bounty-land grant on account of service in the war with Mexico is *prima facie* evidence of his service and honorable discharge; but the service required under the bounty-land law was radically different from that required under the act of January 29, 1887, the former requiring only fourteen days and the latter sixty days; nor were applicants for bounty land required to show that they had served "in Mexico, or on the coast, or frontier thereof, on en route thereto."

Robert W. P. Muse..... 180

"SERVICE"—"INVALID":

Section 4724, Revised Statutes, expressly inhibits a person in the Army, Navy, or Marine Corps from receiving a pension "as an invalid" whilst drawing the pay of his rank or station in the service; but the act of January 29, 1887, provides for the officers and soldiers of the Mexican war a purely *service* pension. Such pension is not given by reason of any "disability" that may have been incurred in the service, nor is it in any sense an invalid pension, such as the aforesaid section inhibits. Therefore, the "surviving officers and soldiers of the Mexican war," whether now in active military service or on the retired list, are entitled to the *service* pension for which the act of January 29, 1887, specifically provides.

Thomas J. Eckerson..... 187

MEXICAN WAR:

The act of January 29, 1887, providing service pensions for survivors of the Mexican war, requires that claimants shall have either actually served in said war or been en route to Mexico and to the seat of war, or ordered away from their place of rendezvous and organization for that purpose.

George H. Brockman (on motion for reconsideration of *decision, vol.* 1, *P. D., p.* 453)..... 289

SERVICE PENSION—MEXICAN WAR:

In applications for service pension under act of January 29, 1887, it is not sufficient to show that, in response to the call for troops to go to Mexico, claimant and others left their homes and proceeded 30 or 100 miles to the place of rendezvous and of enlistment; but it must be shown also that, after said organization had been completed, it *served sixty days* on the coasts or frontier of Mexico, or en route thereto, or was actually engaged in a battle in said war.

Benjamin J. W. French 356

MEXICAN WAR:

The act of Congress, approved January 29, 1887, does not provide a service pension for every person who was in the military service of the United States during the Mexican war, but limits and expressly designates those to whom such a pension may be granted, the character and extent of the pensionable service being specifically described. Proof of actual participation in the war sixty days with the Army or the Navy, or on the coast or frontier of Mexico, or en route thereto, is necessary to establish a claim to pension.

Annie, widow of John Quinn 248

MEXICAN WAR:

Upon a motion for review, filed by the Commissioner of Pensions, the Secretary of the Interior construes the act of January 29, 1887, and re-affirms the ruling of the Assistant Secretary in the case of Thomas J. Eckerson (vol. 2, P. D., p. 187). Under said act, "there is no opportunity to consider the *service* pension as an *invalid* pension."

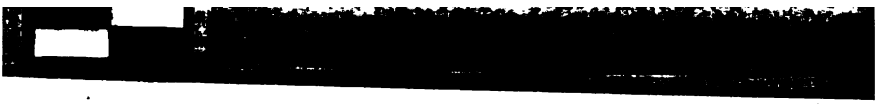
Thomas J. Eckerson (on motion for review) 309

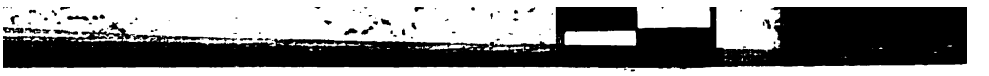
"SERVICE" SUBSTITUTED FOR "DISABILITY" PENSION:

Claimant having filed his original declaration for pension September 15, 1884, alleging disabilities incurred in the war with Mexico, and "the last paper" filed by his attorney to establish the claim being the report of a medical examination dated September 29, 1888, authorizing a pensionable rating at $4 per month, the Department applies to claimant section 4713, Revised Statutes, which provides, in express terms, that, "In all cases in which cause of disability or of death originated in the service prior to the 4th day of March, 1861, and an application for pension shall not have been filed within three years from the discharge or the death of the person on whose account the claim is made, * * * the pension shall *commence* from the date of filing by the party prosecuting the claim the last paper requisite to establish the same." In such case no injustice is done claimant if the Commissioner of Pensions grant him a *service* pension under the act of January 29, 1887, instead of a *disability* pension (commencing from September 29, 1888), under the general law, in accordance with the evidence contained in the "last paper" filed by "the party prosecuting the claim," as "requisite to establish the same."

Burton Randolph 335

O





JAN 2 3 1952